IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY, for Themselves and on Behalf of All Others Similarly Situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Petitioner Coopers & Lybrand prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this action, which reversed an order of the district court and ruled that this action should proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.[1]

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri are not officially reported but are reproduced as Appendix A hereto. The opinion and

[1] This is a companion case to the Petition filed on behalf of Punta Gorda Isles, *et al.*, against the same respondents.

judgment of the United States Court of Appeals for the Eighth Circuit, reported at 550 F.2d 1106, are set forth as Appendix B. The order of the Court of Appeals denying rehearing and rehearing en banc is annexed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1977. Petitioner's timely petition for rehearing was denied on March 28, 1977. This petition is being filed within 90 days of March 28, 1977.

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is an order of a district court determining that an action cannot be maintained as a class action appealable pursuant to 28 U.S.C. § 1291 under the "death-knell" doctrine?

2. Did the Court of Appeals exceed the proper scope of its authority in ordering the district court to re-certify this case as a class action?

STATUTE INVOLVED

This case involves 28 U.S.C. § 1291, which provides in pertinent part: "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

STATEMENT OF THE CASE

The complaint in this action charged petitioner and others with various violations of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 of the S.E.C.

The claim asserted on behalf of the two named respondents amounted to approximately $2,650 plus interest. The complaint also purported to state claims on behalf of a class amounting to several million dollars. The jurisdiction of the district court was predicated upon 15 U.S.C. §§ 77v and 78aa.

At the original hearing on respondents' motion for class-action certification, the evidence showed that the class included, *inter alia*, one member with a claim of approximately $500,000 and another one who had supposedly been damaged to the extent of $140,000. On June 9, 1975, the district court entered an order certifying the case as a class action under Rule 23(c). However, on September 1, 1976, in response to a motion filed by petitioner and in accordance with Rule 23(c)(1), the district court, having questioned respondents' adequacy to represent the class on several other occasions, ruled that the action could no longer be maintained as a class action. Respondents, disdaining the interlocutory appeal procedure of 28 U.S.C. § 1292(b), appealed to the Eighth Circuit under 28 U.S.C. § 1291, which applies only to "final orders." In response to petitioner's motion to dismiss the appeal, the Court of Appeals found as a matter of fact that respondents' individual claim was so miniscule that they would not continue to prosecute the case unless the district court's order was reversed. On the basis of that finding, the Court of Appeals concluded that the order was a "final order" under the "death-knell" theory and therefore appealable.

Despite the fact that Rule 23(c)(1) provides that any class action determination "may be conditional and may be altered or amended before the decision on the merits," the Court of Appeals then proceeded to hold that the district court had abused its discretion in de-certifying the class action. It reversed the district court's ruling and held, in effect, that the class should be re-certified.[2]

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[2] Respondents' alternative Petition for a Writ of Mandamus (8th Cir. No. 76-1906) was dismissed, and respondents have not pursued that matter in this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Eighth Circuit Has Adopted the "Death-Knell" Doctrine That Has Been Rejected by the Third and Seventh Circuits, and Has Applied That Doctrine in a Way That Is Inconsistent With Decisions of the Fifth and Ninth Circuits.

In deciding that it had jurisdiction to hear the appeal in this case, the Eighth Circuit adopted and applied the so-called "death-knell" theory. This doctrine, as applied here, permits an appeal under § 1291 from a district court's order denying class-action status if the Court of Appeals finds that the named plaintiffs will not continue the litigation on an individual basis. The death-knell exception to the finality requirement of § 1291 has been a source of controversy and has produced a divergence of judicial opinion. It has been unqualifiedly rejected by the Third and Seventh Circuits, while being accepted in one form or another by the Second, Fifth, Sixth and Ninth Circuits.

The death-knell doctrine was rejected by the Seventh Circuit in *King v. Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973) where it was held that an order determining that an action could not proceed as a class action was not a final order and could not be appealed under § 1291. In its subsequent *en banc* decision in *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, — U.S. — (1976), the Court adhered to its rejection of the death-knell doctrine.

The Third Circuit took the same view in *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972) even though the value of the individual plaintiff's claim was only $9.00. The court thereafter also reaffirmed its position *en banc* in *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

The death-knell theory had its origins in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). But even the Second Circuit has harbored subsequent misgivings about the wisdom and propriety of the doctrine. In fact, in *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 660 (2d Cir. 1975), Judge Friendly concluded that the doctrine was ill-conceived and called for its abolition.

Further confusion is engendered by the fact that the doctrine is not uniformly applied by those Circuits that have adopted it. For example, the Ninth Circuit does not permit an appeal under § 1291 from an order denying class-action status if *any* member of the class has an individually viable claim. *Hooley v. Red Carpet Corp. of America*, 549 F.2d 643 (9th Cir. 1977); *Share v. Air Properties G, Inc.*, 538 F.2d 279 (9th Cir.), *cert. denied sub nom. Woodruff v. Air Properties G, Inc.*, — U.S. — (1976). The court in *Hooley, l.c.* 645, analyzed the rationale of the death-knell doctrine and refused to employ the simplistic approach adopted by the Eighth Circuit here:

> *"The death knell doctrine is not designed to facilitate immediate review of refusals to certify an action as a class action. It is to make certain that the refusal to certify does not deprive the members of the purported class of an opportunity for review in due course of the refusal on appeal.* All opportunity for such review is destroyed if the refusal will have the practical effect of terminating all effort by anyone to assert the particular cause of action involved and to preserve for review on appeal the allegedly erroneous refusal to certify. *To determine whether such destruction has occurred requires an examination not limited to named plaintiffs."* (Emphasis added.)[3]

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[3] The Fifth Circuit's version of the doctrine was announced in *Gosa v. Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971).

The Eighth Circuit in the instant case focused solely, and myopically, on the claims of the named representatives of the proposed class and ignored the existence of several other sizeable claims. The anomalous effect of the Eighth Circuit's rule, of course, is to encourage litigation by those who have the least at stake.

This Court has recently reiterated the well established principle that ". . . there has been a firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy. Finality of judgment has been required as a predicate for federal appellate jurisdiction." *Abney v. United States*, 45 U.S.L.W. 4954, 4955 (June 9, 1977). Obviously the decision by the district judge in this case to decertify the class action was not a "final" judgment in the traditional sense of that term. The respondents still have their individual claim, which was clearly not *de minimis* and which was certainly viable if respondents desired to pursue it. The Court of Appeals, however, surmised that in all likelihood the respondents (or more probably their lawyer) would choose to abandon the case if the "*in terrorem*" prospects of a class action recovery or settlement were removed. Therefore, although the respondents had purposefully eschewed the Congressionally-created path to the Court of Appeals created by § 1292(b), the Eighth Circuit nonetheless entertained their appeal by branding the district court's order as "final" under § 1291. It is a source of mystery how an economic decision by litigants or their counsel can confer finality on an order that is patently interlocutory. It is precisely that kind of logic which has caused several Circuits to reject the death-knell theory and has recently prompted Judge Friendly to conclude in his concurring opinion in *Parkinson v. April Industries, Inc., supra* at 660 (2d Cir. 1975) that:

> ". . . the best solution is to hold that appeals from the grant or denial of class-action designation can be taken only under the procedure for interlocutory appeals provided by 28 U.S.C. § 1292(b)."

Although it can be seriously questioned whether the death-knell doctrine is even a legitimate interpretation of § 1291, it is also of equal concern whether that doctrine, assuming its validity, represents the optimal—or even an acceptable—solution to the problem created by denial of class-action status under Rule 23. Because there are almost as many views of these problems as there are Circuits, and in light of the burgeoning caseloads already borne by our over-burdened federal courts, a rule which significantly expands the jurisdiction and the workloads of the Courts of Appeals should not be adopted without the imprimatur of this Court.

Even if we assume that the death-knell theory is an appropriate response to the situation presented by the instant case, its very application has implications which militate against its endorsement by this Court. One of the obvious problems, of course, is that the death-knell doctrine requires the appellate courts to make findings of fact on the issue of finality on a record which simply does not address that issue. Among the other shortcomings of the death-knell rule is the fact that it is not even-handed in its application because it is available to plaintiffs but never to defendants. Moreover, since a ruling adverse to a class-action plaintiff is immediately appealable, whereas an order granting a class-action status is not, it is not unreasonable to anticipate that these considerations may very well create a systemic bias in favor of plaintiffs in class-action determinations. Any factors which would tend to increase the number of class actions in the federal system, particularly for reasons extraneous to the purposes of Rule 23, would only serve to heighten "the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5." *Blue Chip Stamps v. Manor Drug Stores*, 421

U.S. 723, 740 (1975) as quoted in *Santa Fe Industries, Inc. v. Green*, — U.S. —, 45 U.S.L.W. 4317, 4322 (1977).

The death-knell theory is an unwarranted and inept vehicle for circumventing the machinery provided by Congress in §§ 1291 and 1292(b). The sharp conflict among the Circuits is ripe for review, and the problems created by the death-knell doctrine call for resolution by this Court.

II. The Court of Appeals Has Unjustifiably Interfered With the District Court's Class Action Determination.

In addition to the important jurisdictional question presented by the Eighth Circuit's adoption of the death-knell theory, this case also poses the issue explicitly left unresolved in this Court's recent opinion in *East Texas Motor Freight System, Inc. v. Rodriquez*, 45 U.S.L.W. 4524 (May 31, 1977), where the Court said:

> ". . . we do not reach the question whether a Court of Appeals should ever certify a class in the first instance."

In the case at bar, the district court originally certified the case for class-action treatment in June of 1975. At the same time, however, the district court, puzzled by the respondents' failure to join the underwriters as defendants and apprised of the fact that respondents' then-counsel regularly represented one of the underwriters, directed counsel to show cause why he should not be enjoined from representing the class. Counsel chose not to contest the matter and promptly withdrew from the action.

When respondents' new counsel appeared, the district court asked them to make a determination as to the advisability of naming the underwriters as defendants in the lawsuit. Respondents apparently reached the conclusion, however, that the statute of limitations had expired on all claims against the underwriters

during the period in which they had suppressed the conflict-of-interests problems of their first attorney. When the court realized that respondents' conduct may have seriously impaired the rights of their fellow class members, it expressed serious reservations about respondents' ability to fairly protect the interests of the class and ordered the parties to notify class members that, if they felt it necessary to protect their interest, they could either petition for an appointment of a new class representative or intervene in the action. While pressing for discovery on the merits, respondents delayed for many months in commencing discovery of the names and addresses of the class members and engaged in a procedural squabble about the form of notice to be given to the class. This resulted in considerable delay in sending the notice to the class members. Finally, exasperated by respondents' behavior and convinced of their inability to lead the class, the district court de-certified the class on September 1, 1976.

The Court of Appeals, after first announcing its new jurisdictional rule, summarily swept aside the district court's de-certification order and, in effect, re-certified the class. The advisability of that ruling, made on the basis of a cold record, as distinguished from the district court's years of living with this case, is questionable at best and evinces a growing disregard for the adjudicatory scheme embodied in Rule 23.

Rule 23 itself recognizes the existence of substantial discretion in the trial court with regard to class action matters and provides that class action determinations may be conditional. Unfortunately, however, steadily increasing encroachment by appellate courts threatens to subvert the purpose of the Rule. This is particularly disturbing in Securities Act cases such as this, for the Court of Appeals, without even considering whether the original certification of the class was appropriate or whether, for example, the class action would be "manageable," has simply substituted its view for that of the district court and has re-cer-

tified the class. Hence, petitioner has summarily been subjected, *inter alia*, to extensive and wide-ranging discovery on the merits in a class-action context, thus creating the problems about which this Court voiced apprehension in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975)

> ". . . [T]o the extent that [the discovery process] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit. Yet to broadly expand the class of plaintiffs who may sue under Rule 10b-5 would appear to encourage the least appealing aspect of the use of the discovery rules."

In the *East Texas Motor Freight* case, the Court restored some of the equilibrium provided by Rule 23. But the action of the Court of Appeals in the instant case constitutes an unwarranted interference with the district court's functions under Rule 23. Accordingly, this Court should grant review to further reinforce the discretion vested in the district courts in class action matters.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Cecil and Dorothy Livesay,
Plaintiffs,
v.
Punta Gorda Isles, Inc., et al.,
Defendants.
No. 73 C 517 (3)

Order

(Filed September 1, 1976)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that the motion of the various defendants to decertify this case as a class action be and is GRANTED; and

IT IS FURTHER ORDERED that this action be and is decertified as a class action; and

IT IS FURTHER ORDERED that this matter shall proceed to trial only upon the individual claims of Cecil and Dorothy Livesay; and

IT IS FURTHER ORDERED that this action shall be set for trial at a later date; and

IT IS FURTHER ORDERED that all restrictions on discovery shall be lifted, and that discovery with regards to the individual claims of Cecil and Dorothy Livesay shall proceed in a normal fashion.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

Memorandum

(Filed September 1, 1976)

This matter is before the Court upon the motion of the various defendants to decertify this lawsuit as a class action.

The basis of the various defendants' motion is that the plaintiffs, as class representatives, are failing to prosecute this action, and are therefore denying the defendants a right to a speedy adjudication of the claims against them.

In order to deal with the defendants' motion, a brief chronology of events is required. This lawsuit was originally filed on July 27, 1973. Plaintiffs' original counsel did not seek a class action hearing until April 9, 1974. On June 19, 1975, this Court, in a Memorandum and Order, declared that the action should proceed as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The delay between the class action hearing, and this Court's certification was due to the substitution of new counsel for plaintiffs. On October 23, 1975, this Court partially dissolved its stay order regarding discovery, and allowed discovery to proceed as to the names and addresses of the members of the class so that the appropriate class action notice could be sent. The plaintiffs did not institute discovery

to determine the names and addresses of the absent class members until July 20, 1976.

It is the opinion of the Court that the plaintiffs have failed to offer adequate excuses for their delay in prosecuting this action as a class action. In response to the motion of the defendants, the plaintiffs have alleged that it is anomalous for the defendants to attempt to protect the interests of the members of the class. The Court agrees that such concern on the part of the defendants involves tears of the crocodilian variety, however, the plaintiffs misjudged the true thrust of the defendants' motion. The defendants are merely seeking, as is their right, to have a speedy adjudication of the claims against them. Since this lawsuit has been pending for approximately three years, and class action notices have not gone out more than a year after the action was certified as a class action, the Court is forced to the conclusion that there has been a lack of prosecution on the part of the plaintiffs as class representatives.

Since the plaintiffs seem to have no desire to prosecute this matter as a class action, the Court will decertify this matter as a class action, and the lawsuit shall proceed on the individual claims of Cecil and Dorothy Livesay as stated in the accompanying Order.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 76-1881

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellants,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Missouri

No. 76-1906

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Petitioners,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John

W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),

and

Honorable H. Kenneth Wangelin, United States District Judge,
Respondents.

Petition for Writ of Mandamus

Submitted: January 13, 1977

Filed: March 4, 1977

Before HEANEY and STEPHENSON, Circuit Judges, and STUART,* District Judge.

STEPHENSON, Circuit Judge.

In these consolidated cases, Cecil and Dorothy Livesay (plaintiffs) seek review of the district court's order decertifying their action as a class action. In No. 76-1881, plaintiffs appeal from that order. In No. 76-1906, plaintiffs seek a writ of mandamus compelling the district court to vacate its decertification order.

On July 27, 1973, plaintiffs filed a complaint seeking approximately $2650 in individual damages resulting from their purchase of $5000 worth of debentures and 100 shares of common stock issued by Punta Gorda Isles, Inc. (Punta Gorda), a Florida land development corporation, pursuant to a registration statement and prospectus dated May 2, 1972. The essence of plaintiffs' claim was that the prospectus and registration statement contained materially misleading statements and omissions.[1] The

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* The Honorable William C. Stuart, United States District Judge for the Southern District of Iowa, sitting by designation.

[1] Essentially, the complaint alleges: (1) a failure to disclose that new accounting rules of the American Institute of Certified Public

named defendants were Punta Gorda, certain individuals who were officers and directors of Punta Gorda, and the accounting firm of Coopers & Lybrand (Coopers), which had certified the financial statements in the registration statement and prospectus. Plaintiffs sought to represent a class of approximately 1,800 persons who had purchased securities at the May 2, 1972, public offering.

On April 9, 1974, plaintiffs moved pursuant to Fed. R. Civ. P. 23 to have the action certified as a class action. On May 13, 1974, the district court granted Coopers' motion for a stay of all discovery except discovery relating to the class action determination. On June 24, 1974, oral argument on the class action certification motion was held. On July 16, 1974, the district court denied Coopers' motion to strike the class action allegations in the complaint, but did not at that time certify the class. On September 23, 1974, the district court denied plaintiffs' motion to lift the stay on substantive discovery.

On November 1, 1974, plaintiffs filed a petition for a writ of mandamus in this court, requesting that the district court be ordered to lift the stay on substantive discovery. This court denied the petition by order dated November 15, 1974, but expressed the view that plaintiffs should request a prompt ruling on their motion for class action certification and that the district court should promptly rule on the motion and thereafter permit discovery on the merits. *Livesay v. Punta Gorda Isles, Inc.*, No. 74-1827 (8th Cir., November 15, 1974).

Accountants would require an adverse restatement of earnings for 1967-1972; (2) a failure to disclose that the earnings consisted of installment sale contracts where cash would not be received until future dates; (3) a misleading statement of the ratio of earnings to fixed charges because not based on actual cash flow; and (4) a failure to disclose that certain Florida ecological regulations would seriously impede Punta Gorda from developing artificial waterfront property.

On December 30, 1974, an evidentiary hearing on the class action certification motion was held in the district court. On June 19, 1975, the district court entered an order certifying the action as a Rule 23(b)(3) class action, which order expressly found plaintiffs to be adequate class representatives. The order also held that plaintiffs' counsel had a conflict of interest because he had represented one of the underwriters of the Punta Gorda offering on unrelated matters. The order deemed this conflict serious because none of the underwriters had been joined as defendants in the plaintiffs' suit. Plaintiffs' counsel withdrew, and on June 30, 1975, plaintiffs' current counsel entered its appearance.

On July 25, 1975, plaintiffs moved to dissolve the stay on substantive discovery. Coopers opposed the motion and sought a reconsideration of the order certifying the action as a class action. On October 23, 1975, the district court denied plaintiffs' motion to dissolve the stay. In its order, the district court expressed concern about the adequacy of plaintiffs as class representatives, based largely on plaintiffs' failure to join any underwriters as defendants. The court did not, however, decertify the class action at that time, because it believed that such decertification might jeopardize the claims of absent class members. The court directed the parties to prepare forms of notice of the pendency of the class action to be mailed to the class members and also lifted the stay on discovery to the extent that plaintiffs could seek the names and addresses of the class members. The parties submitted proposed forms of notice in November 1975.

On March 1, 1976, the district court mailed to the parties its proposed form of notice. Both parties submitted suggested changes, and on April 9, 1976, the district court mailed to the parties the final form of notice.

On April 20, 1976, plaintiffs' counsel telephoned counsel for Punta Gorda and requested the names and addresses of the

initial registered owners (after the underwriters) of the debentures and common stock sold pursuant to the May 2, 1972, registration statement. By letter dated April 21, 1976, Punta Gorda's counsel declined to furnish that information.

On July 9, 1976, plaintiffs requested the district court to conduct a conference for the purpose of discussing the issues involved in discovery of the names of class members. On July 20, 1976, plaintiffs served defendants with a motion to produce the names and addresses of the initial registered owners of the stock and debentures. On July 23, 1976, Coopers filed a motion to decertify the action as a class action. On July 26, 1976, the conference requested by plaintiffs was held at which the district court ordered the parties to submit briefs, etc. in support of the various pending motions.

On September 1, 1976, the district court issued a memorandum and order decertifying the class action. The court found that plaintiffs had inordinately delayed in prosecuting the case and were thus not adequate class representatives. The order also lifted the stay on substantive discovery. Subsequently, both parties have engaged in some discovery on the merits. Plaintiffs now seek review of the September 1 decertification order by direct appeal (No. 76-1881) and by a petition for a writ of mandamus (No. 76-1906).

We are confronted with the threshold issue of our jurisdiction to hear an appeal from the district court's order decertifying the lawsuit as a class action. Defendants allege that the order is not a final order which is appealable under 28 U.S.C. § 1291. We disagree.

Orders denying class action certification are reviewable under 28 U.S.C. § 1291 if they sound the "death knell" of the action. *See, e.g., Share v. Air Properties G. Inc.*, 538 F.2d 279, 282 (9th Cir.), *cert. denied sub nom., Woodruff v. Air Properties*

G. Inc., 97 S.Ct. 321 (1976); *Ott v. Speedwriting Pub. Co.*, 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams v. Mumford*, 511 F.2d 363, 366 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 399-401 (2d Cir. 1974); *Graci v. United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Eisen v. Carlisle & Jacquelin* (*Eisen I*), 370 F.2d 119, 120-21 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). *See also Hartmann v. Scott*, 488 F.2d 1215, 1220 (8th Cir. 1973); *compare, In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975). *Contra, King v. Kansas City Southern Industries*, 479 F.2d 1259, 1260 (7th Cir. 1973); *Hackett v. General Host Co.*, 455 F.2d 618, 621-26 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

To determine whether a decertification order sounds the "death knell" of the action, we begin by examining the amount of the class representatives' individual claim.[2] Plaintiffs' individual claim for damages totals approximately $2,650. Because this claim falls between those cases where the individual claim is clearly not viable[3] and those cases where the individual claim

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[2] Defendants allege that because the record reveals other members of the purported class who have substantial individual claims, the "death knell" doctrine should not apply. That was the result reached in *Share v. Air Properties G. Inc., supra*, 538 F.2d at 283. We do not consider the soundness of that holding, however, because the case is distinguishable on its facts. In *Share* the court referred to class members who were "actively engaged" in the litigation. Here the record reveals only that certain class members had indicated willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' counsel.

[3] *See, e.g., Ott v. Speedwriting Pub. Co., supra* ($30); *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971) ($386); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) ("less than $1000"); *Eisen v. Carlisle & Jacquelin, supra* ($70).

is viable,[4] we must examine the amount of plaintiffs' claim in relation to their financial resources and the probable cost and complexity of the lawsuit. *See, e.g., Share v. Air Properties G. Inc., supra,* 538 F.2d at 282; *Graci v. United States, supra,* 472 F.2d at 126; *Korn v. Franchard Corp.,* 443 F.2d 1301, 1307 (2d Cir. 1971).

Plaintiffs, both of whom are employed, have an aggregate yearly gross income of $26,000. Their total net worth is approximately $75,000, but only $4,000 of this sum is in cash. The remainder consists of equity in their home and investments.

As of December 1974 plaintiffs had already incurred expenses in excess of $1,200 in connection with this lawsuit. Plaintiffs' new counsel has estimated expenses of this lawsuit to be $15,000. The nature of this case will require extensive discovery, much of which must take place in Florida, where most defendants reside. Moreover, the allegations regarding the prospectus and financial statements will likely require expert testimony at trial.

After considering all the relevant information in the record, we are convinced that plaintiffs have sustained their burden[5]

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[4] *See, e.g., Shayne v. Madison Square Garden Corp., supra* ($7,482); *Falk v. Dempsey-Tegeler & Co.,* 472 F.2d 142 (9th Cir. 1972) ($14,125); *Milberg v. Western Pac. R.R.,* 443 F.2d 1301 (2d Cir. 1971) ($8,500).

[5] Plaintiffs who seek to invoke the "death knell" doctrine have the burden of developing, in the trial court, an adequate factual record upon which an appellate court may determine whether the action will proceed absent class certification. *Share v. Air Properties G. Inc., supra,* 538 F.2d at 282; *Gosa v. Securities Investment Co.,* 449 F.2d 1330 (5th Cir. 1971). As the *Gosa* court indicated, the preferable way to do this is in a post-ruling hearing where the district court has the opportunity to enter appropriate findings of fact. No such hearing was held in the instant case. However, we do not read *Gosa* as requiring such a hearing in all cases. In the instant case, the record of the entire proceeding contains sufficient facts to allow us to make an informed judgment on the matter.

of showing that they will not pursue their individual claim if the decertification order stands. Although plaintiffs' total net worth could absorb the cost of this litigation, "it [takes] no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less." Douglas, *Protective Committees in Railroad Reorganizations,* 47 Harv. L. Rev. 565, 567 (1934). We conclude we have jurisdiction to hear the appeal.

The district court has wide latitude in determining whether an action may be maintained as a class action. If the court applies the proper criteria in making this determination, its decision is reviewable only for an abuse of discretion. *Wright v. Stone Container Corp.,* 524 F.2d 1058, 1061 (8th Cir. 1975); *Shumate v. Nat'l Ass'n of Securities Dealers,* 509 F.2d 147, 155 (5th Cir.), *cert. denied,* 423 U.S. 868 (1975); *Kamm v. California City Development Co.,* 509 F.2d 205, 210 (9th Cir. 1975); *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 245 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975); *City of New York v. Int'l Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2d Cir. 1969).

Because the decertification order in this case was predicated solely on the finding that plaintiffs were not adequate class representatives because they had inordinately delayed in prosecuting the litigation,[6] the sole issue[7] on this appeal may be

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[6] As plaintiffs correctly point out, the decertification order was phrased in terms of a denial of defendants' rights to a speedy adjudication of claims against them. This factor is not a proper criterion to consider in determining whether plaintiffs will adequately represent the members of the class. However, a review of the entire record convinces us that the district court was concerned with plaintiffs' failure to prosecute the case as it related to their adequacy as class representatives.

[7] Plaintiffs also seek to raise the following issues: (1) that the decertification order was erroneously predicated on plaintiffs' failure to join underwriters as defendants; (2) that the district court ex-

simply stated: was the district court's decertification order finding plaintiffs to be inadequate class representatives so erroneous as to constitute an abuse of discretion? We answer the question in the affirmative, and we reverse.

The decertification order was apparently based upon three distinct periods of delay. The first period of delay was approximately eight months from the date of filing the complaint until the plaintiffs moved to have the action certified as a class action. The record indicates that this period of time was largely devoted to preparing and amending pleadings and engaging in discovery. We note that plaintiffs filed their motion to certify shortly after defendants filed their last responses to plaintiffs' interrogatories. In these circumstances, we find little to support a finding that plaintiffs were dilatory in moving for class action certification. Furthermore, the general rule is that a delay prior to moving for class action certification is not a basis for refusing certification absent some showing of prejudice. *See, e.g., Bernstein v. National Liberty Int'l Corp.*, 407 F. Supp. 709, 714 (E.D. Pa. 1976); *Souza v. Scalone*, 64 F.R.D. 654, 656 (N.D. Cal. 1974); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78, 80 (M.D. Pa.), *appeal dismissed without opinion*, 505 F.2d 729 (3d Cir. 1974); *Feder v. Harrington*, 52 F.R.D. 178, 181-82 (S.D.N.Y. 1970); *Epstein v. Weiss*, 50 F.R.D. 387, 392 (E.D. La. 1970). No showing of prejudice was made here.

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hibited a lack of fair and impartial judicial procedure; (3) that the district court ordered plaintiffs to follow class action procedures which violate the federal rules; and (4) that the district court violated this court's mandate by not promptly lifting the stay on substantive discovery after certifying the class. The first two claims are devoid of factual support in the record. The third claim is relevant to the decertification order only insofar as it alleges that the class action procedures authorized by the district court impeded the progress of the litigation. As such, it merely restates the allegation that the delay was not caused by plaintiffs. The final claim is moot because the decertification order lifted the stay on substantive discovery. Moreover, as with the third claim, its only relevance to the decertification order is the allegation that the stay of discovery was a contributing cause of the delay.

The second time period referred to in the decertification order was the 14 month period between the motion for class action certification and the order certifying the class. The district court's decertification order attributed this delay to the appointment of new counsel for plaintiffs. However, it should be noted that new counsel for plaintiffs did not appear until *after* the order certifying the class was entered.

The defendants' only colorable allegation of delay during this second period is that plaintiffs were dilatory in moving for an evidentiary hearing on the class action motion. The record discloses that the district court indicated during oral argument that an evidentiary hearing should be held if the court decided that the issue of individual reliance did not bar maintaining the suit as a class action. This decision was reached on July 16, 1975, and plaintiffs did not seek an evidentiary hearing until September 20, 1975, a period of nine weeks. During this nine-week period plaintiffs were not inactive. They moved to enjoin the destruction of documents and also moved to lift the stay on substantive discovery. We cannot say, and the district court did not find, that pursuing these avenues was a sign of inaction, negligence, or a failure adequately to protect the interests of other class members.

The third period of time mentioned in the decertification order is the period from the district court order allowing discovery of the names and addresses of class members until plaintiffs first sought to discover that information.[*] This period runs

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[*] A persuasive argument can be made that this is the only period of delay upon which the decertification order could properly be predicated. Because the first two periods of delay occurred prior to the certification order, defendants could have raised the issue of failure to prosecute at that time, but did not. They may now be foreclosed from raising the issue based on these delays. *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1975), *rev'd in part on other grounds*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom., Arthur Andersen & Co. v. Kramer*, 97 S.Ct. 90 (1976). *Cf. In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975).

from October 23, 1975, to April 20, 1976, when plaintiffs first requested Punta Gorda's counsel to furnish the names and addresses of the initial registered owners of the securities. Defendants contend that because plaintiffs have offered no compelling excuse for failing to request this information more promptly, this delay *ipso facto* justified the district court's finding that plaintiffs are inadequate representatives. We disagree.

We begin by noting that there has been no showing that plaintiffs' failure to request production of this information at an earlier date has prejudiced the class members. The notices to the class members could not have gone out until the final form of notice was approved by the court, which did not occur until April 9, 1976. Eleven days later, plaintiffs' attorney telephoned counsel for Punta Gorda and requested that Punta Gorda furnish the names and addresses of the initial registered owners of the securities in question. In a letter dated August 4, 1975, counsel for Punta Gorda had agreed to furnish this information. However, in response to the telephone call, counsel for Punta Gorda wrote a letter to plaintiffs' counsel refusing to furnish this information.[9] In these circumstances we cannot agree that plaintiffs were dilatory in seeking the names and addresses of potential class members. They had every right to expect that defendants would promptly furnish this information. To hold that plaintiffs are inadequate class representatives because they failed to anticipate defendants' eventual objections to discovery would be tantamount to saying that class representatives must be gifted with prescience. This we decline to do.

That there has been undue delay in this lawsuit is beyond question. From examination of the entire record of this protracted proceeding, however, it becomes quite clear that much of the delay in this case is directly attributable to defendants. For example, defendants have been granted 14 extensions of time, totalling approximately 190 days, in which to file pleadings, motions and other papers. In addition, defendants have filed motions to reconsider or modify earlier court orders, which motions have consistently alleged grounds previously ruled upon by the court. The clear import of this course of conduct is to make this lawsuit as time-consuming and costly as possible.

[9] This refusal was later formalized in objections to plaintiffs' motion to produce. One of the objections to this motion was that the requested information was not in the possession of Punta Gorda, but in the possession of Punta Gorda's transfer agent. Because the transfer agent could only release this information at the direction of Punta Gorda, we find this objection little else than a delaying tactic.

In addition, the district court has on some occasions taken action which did not advance the progress of this litigation. The court took approximately five months to decide the class action certification motion after the evidentiary hearing was held. The court took approximately four months to approve the form of notice to the class members. These delays appear to have been justifiable due to the complex nature of the questions presented. However, during this time there was a stay of substantive discovery in effect. The practical effect of this stay was to prevent the parties from concurrently proceeding to the merits while the court considered the various procedural questions. In these circumstances, virtually all the plaintiffs could do to advance the course of this litigation was to attempt to lift the stay on discovery. Plaintiffs twice sought to lift this stay and were twice unsuccessful.

We conclude that the district court order decertifying the action as a class action because of plaintiffs' failure to prosecute is wholly unsupported by the record, and we accordingly reverse. We do not disturb that portion of the order which lifted the stay on substantive discovery.

The record in this case compels us to make certain further comments. We are dismayed at the utter lack of cooperation between opposing counsel. The record is replete with instances

where relatively minor procedural matters have mushroomed into full-scale confrontations, with the concomitant avalanche of briefs, memoranda, etc. By and large, these matters could, and should, have been settled informally by the parties or, if necessary, in conference with the district court.

Even more disturbing is the tone with which these proceedings have been conducted. All too often the parties have engaged in personal attacks on opposing counsel and the district court. These baseless allegations are not a substitute for advocacy based on the facts and the law and they have no place in our judicial system.

On remand, we anticipate that this conduct will not reoccur. If it does, the district court will be forced to take a more active role in managing this case to insure that it progresses as expeditiously as possible consistent with fairness to the parties. *See Manual for Complex Litigation* § 1.10 (1973).

In No. 76-1881, the order of the district court is reversed and the cause remanded for further proceedings consistent herewith. In No. 76-1906, the petition for writ of mandamus is dismissed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
for the Eighth Circuit

No. 76-1881 September Term, 1976

Cecil Livesay and Dorothy Livesay, for themselves and on behalf of all others similarly situated,

Appellants,

vs.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),

Appellees.

JUDGMENT

(Filed March 4, 1977)

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

March 4, 1977

A true copy

Attest: /s/ Robert C. Tucker

Clerk, U. S. Court of Appeals, 8th Circuit

APPENDIX C

United States Court of Appeals
for the Eighth Circuit

76-1881 September Term, 1976

Cecil Livesay, et al., etc., Appellants,
vs.
Punta Gorda Isles, Inc., et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petitions for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

March 28, 1977

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED JUNE 23, 1977

CERTIORARI GRANTED NOVEMBER 14, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

APPENDIX

INDEX

CIVIL DOCKET

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

73 C 517

Cecil Livesay
and
Dorothy Livesay
vs.

Punta Gorda Isles, Inc.
Wilber H. Cole
Alfred M. Johns
Robert J. Barbee
Samuel A. Burchers, Jr.
Russell C. Faber
John Matarese
Robert C. Wade
Earl Drayton Farr, Jr.
John W. Douglas, D.D.S.
Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery)

Date	Proceedings
1973	
July 27	Complaint filed and summons issd.
Aug. 13	Order filed. Cause herein assigned to Court 3, Judge Wangelin presiding.

Aug. 21 Bryan, Cave, McPheeters & McRoberts enter appearance for deft Coopers & Lybrand; said deft granted to & includ. Sept. 20, 1973, to answer or otherwise respond to the complaint.

Aug. 24 By leave of Court defendants Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., John Matarese, Robert C. Wade, and John W. Douglas granted to and including September 20, 1973, to answer and otherwise respond with respect to the complaint of plaintiffs; Peper, Martin, Jensen, Maichel and Hetlage appears specially for the purpose of this extension of time only and for no other purpose, reserving all rights of said defendants to object to process, venue or jurisdiction—per memo fld.

Sept. 5 Plffs' first amended complaint filed.

Sept. 6 Plffs' request for production of documents filed.

Sept. 19 Deft Coopers & Lybrand granted an addnl 20 das., to & including October 10, 1973, to answer or otherwise respond to plff's 1st amended complaint.

Sept. 20 By leave of court defts Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., John Matarese, Robert C. Wade, and John W. Douglas granted to and including October 12, 1973 to answer or otherwise respond with respect to the complaint of plffs. Peper, Martin, Jensen, Maichel and Hetlage appear specially for the purpose of this extension of time only and for no other purpose, reserving all rights of said defts to object to process, venue or jurisdiction.

Sept. 20 By leave of court deft Earl Drayton Farr, Jr. granted to and including October 12, 1973 to answer or

otherwise respond with respect to the complaint of plffs. Peper, Martin, Jensen, Maichel and Hetlage appear specially for the purpose of this extension of time only and for no other purpose, reserving all rights of said deft to object to process, venue or jurisdiction.

Oct. 2 Marshal's returns on summons, etc. filed as follows: Deft Coopers & Lybrand served 8-1-73; Punta Gorda Isles, Inc, Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, John Matarese, Robert C. Wade, served 8-7-73; Samuel A. Burchers, Jr. served 8-16-73; Russell C. Faber served 9-21-73; Earl Drayton Farr, Jr. served 8-30-73; and John W. Douglas served 8-9-73.

Oct. 5 By leave of court, defendants other than Coopers & Lybrand granted until Wednesday, October 10, 1973 in which to file their response to plaintiffs' request for production of documents.

Oct. 9 Answer of deft Punta Gorda Isles, Inc. to plff's 1st amded complaint fi'ed.

Joint answer of defts Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, to plffs' 1st amded complaint filed.

Response to defendants Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas to plaintiffs' request for production of documents filed, with attached Exhibits "A" and "B".

Oct. 10 Answer of deft Coopers & Lybrand to plffs' 1st amded complaint filed.

Oct. 18 Plffs' demand for trial by jury only with respect to the issue of liability filed.

Nov. 28 Interrogatories directed to plaintiffs by defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S., filed.

Dec. 3 Plffs' interrogs addressed to defts Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S., filed.

Dec. 10 Plffs' interrogs addressed to deft Coopers & Lybrand filed.

Dec. 19 By leave Plaintiffs granted until 1/20/74 in which to answer or object to interrogatories heretofore served upon them.

Dec. 28 Defts granted to & including Feb. 1, 1974 to answer or object to plffs' interrogs to defts Punta Gorda Isles, Inc. et al.

1974

Jan. 4 Deft Coopers & Lybrand granted until Feb. 8, 1974 in which to answer or object to the interrogs heretofore served upon it by plffs.

Jan. 22 Plffs' answers to interrogatories of defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr. and John W. Douglas filed.

Jan. 30 Set for jury trial on Monday, March 18, 1974. (Noticed—EM)

Jan. 31 By leave of court, defendants Punta Gorda Isles, Inc., et al. granted 15 additional days through February 16, 1974, to file answers to plaintiffs' first interrogatories which are not objected to.

Feb. 1 Objections of defts Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S. to interrogatories filed.

Feb. 4 Trial setting for 3/18/74 vacated to be rescheduled in September, 1974.

Feb. 8 Answers of defts Coopers and Lybrand to interrogs of plffs fld. Objections of deft Coopers & Lybrand to plffs' interrogs fld.

Feb. 14 Answers—separate answers of defts fld.

Answers—fld by plffs to interrogatories of defts Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., & John W. Douglas.

Mar. 27 Notice to Take Depo—of Robert L. Proost fld by plffs.

Apr. 11 Motion for Order to Determine That Class Action Can Be Maintained Under Rule 23—fld by plff. Oral argument requested.

Supporting Brief—fld with Exhibit A attached.

Apr. 16 Memo for Clerk—Comes now deft, Coopers & Lybrand, and, by leave of Court, is granted 30 addi-

tional days to & incl. 5/16/74, within which to file a Memorandum in Opposition to plff's Motion for Order to Determine That Class Action Can Be Maintained Under Rule 23.

Apr. 17 Order—filed, granting defts Punta Gorda, to and incl. 4/16/74 to file memo in opposition to pltffs; motion filed 4/11/74. (by endorsement on memo request of attys for Punta Gorda)

Apr. 17 Set for Jury Trial September 3, 1974.

Apr. 18 Parties present; Motion for order to determine that class action is maintainable under R. 23, passed to further order of the Court.

Apr. 30 Motion for Limited Stay of Discovery—filed, by attys for deft, Coopers & Lybrand w/Memo & (illegible) w/proposed order.

Apr. 30 Pre-trial conference had js 6.

May 6 Pltff's Brief in Opposition to Deft. Coopers & Lybrand's Motion for Limited Stay of Discovery fld. by Atty Green for pltff.

May 14 Memo Reply of Coopers & Lybrand's to Arguments Raised by Plaintiff's in Their Reply Memo,—fld. by Attys Riddle & Hennelly.

May 14 Memo & Order fld. deft's motion for limited stay R. 26(c) granted except relating to class action cc attorneys.

May 14 Copy of letter to J. Wangelin fld. confirming tel. conversation that deft is granted to Mon. May 20, to file its Memo in Opposition to Pltf's motion for Class Action Designation.

May 15 Motion of Defts. Punta Gorda Isles, Cole, Johns, Barbee, Burehrs, Faver, Matarese, Wade, Farr and Douglass fld to require pltffs to post surety bond w/aff. memo in support of same and proposed order by Atty Richter.

May 15 Memo of above defts in opposition to pltff's motion for order determining that a class action can be maintained fld by Atty Richter.

May 20 Motion of defts. Coopers, etc. pursuant to R. 12(b)(6) & 23 to dismiss Cts. I & II of pltffs 1st amend complaint as a class action with memo., fld by Atty Riddle for Coopers & Lybrand.

May 19 Motion for limited stay of discovery and reply, submitted to J. Wangelin.

June 3 Memo for Clerk fld. by leave pltffs granted until June 7, to submit reply memo on class action motion and motion for undertaking for costs.

June 6 Motions filed 5/20/74 submitted to J. Wangelin.

June 7 Reply brief in support of class action determination —fld on behalf of pltffs by Atty. Green.

June 7 Pltffs' brief in opposition to defts' motion to secure the payment of costs—fld on behalf of pltffs by Atty Green.

June 21 Memo of Deft Coopers & Lybrand in response to Pltffs Reply Brief on Motion for Class Action Determination and Motion of Coopers & Lybrand to Strike Affidavit of Rosenthal—fld by Attys for deft (V. Riddle)

June 21 Deposition of Cecil Livesay (2 vols) taken on behalf of all defts except Coopers & Lybrand and Deposi-

tion of Dorothy Livesay (same as Cecil Livesay) 1 vol. fld by Reporter Schroeder.

July 16 Memorandum & Order (HKW, J), fld. Deft's (Coopers & Lybrand) to Dismiss Cts I and II as a class Action, denied. Copy to Attys.

July 16 Memorandum & Order—fld. Defts' motion to req. plffs to secure payment of costs by posting bond, etc., Denied at this time. cc to Attys.

Aug. 30 Cause passed to further Order of Ct. Parties Notified.

Sept. 4 Motion of Plffs for an Order Enjoining Destruction of Documents with Suggestions in Support thereof, fld.

Sept. 4 Motion to Dissolve Stay Order Relating to Discovery, fld. by plffs.

Sept. 4 Motion to Compel Defts Punta Gorda Isles, Inc. and the Individual Defts. to Produce Copies of Certain Documents, fld. by plffs.

Sept. 12 By Ct. leave, Deft. Coopers & Lybrand granted an additional 9 days to and including 9/20/74 to respond to plffs' Motion for and Order Enjoining Destruction of Documents and Motion to Dissolve Stay Order Relating to Discovery.

Sept. 12 Memorandum of Deft. Punta Gorda Isles, Inc. and Individual Defts. in Opposition to Plffs' Motion to Dissolve Stay Order, fld.; Memorandum of Deft. Punta Gorda Isles, Inc. and Individual Defts. in Opposition to Plffs' Motion to Compel Production of Certain Documents, fld; and Memorandum of Deft Punta G. Isles, Inc. and Indiv. Defts. in Opposition to Plffs' Motion for an Order Enjoining Destruction of Documents, fld.

Sept. 18 Mtns. fld. 9/4/74 submitted to Judge Wangelin.

Sept. 20 Memorandum of Deft. Coopers & Lybrand in Oppo. to Plffs' Mtn. to Dissolve Stay Order Relating to Discovery.

Sept. 20 Memorandum of Deft. Coopers & Lybrand in Opposition to Plffs' Mtn. for an Order Enjoining Destruction of Documents.

Sept. 23 Further Suggestions and Aff. in Support of Plffs' Motion for an Order Enjoining the Destruction of Documents fld by Plffs.

Sept. 23 Further Suggestions in Support of Plffs' Motion to Dissolve Stay Order Relating to Discovery, fld.

Sept. 23 Order, fld. Mtns seeking an order enjoining des. of documents by deft, to dissolve a Stay Order, or in the alter. and Order modifying Stay Order, etc. Denied. Copy sent attys. of record.

Sept. 24 Suggestions by Punta Gorda Isles Defts in Oppo. to Plffs' Mtn. for and Order Enjoing the Destruction of Documents and Suggestions by Punta Gorda Isles Defts in Oppo. to Plffs' Mtn. to Dissolve the Stay Order.

Oct. 8 Plaintiff's Brief in Opposition to Deft Coopers & Lybrand's Motion to Modify the Court's Order dated 7/16/74, Relating to "Reliance", fld.

Oct. 5 Case Set for Trial, Mon., Dec. 16, 1974) (Jury).

Nov. 4 Copy of Petition for Writ of Mandamus filed in U.S.C.A., 8th Circuit (U.S.C.A. No. 74-1827) fld by Plffs received.

Dec. 5 Pre-Trial Conference had. Trial setting of 12/16/74 Vacated and Case passed to further Order of Ct.

Parties to appear 12/30/74 for hearing on Class Action.

Dec. 30 Parties appear for hearing on Class Action. Upon receipt or transcript, parties to file briefs.

1975

Jan. 17 Transcript of Hearing had 12/30/74 fld by Off. Ct. Rptr.

Feb. 7 Brief in Support of Motion to determine the Class Action be maintained under R 23—fld by Plffs.

Mar. 12 By leave of Ct. deft Coopers & Lybrand granted to and inc. 3/21/75 to file its Post Hearing Memorandum, etc.

Mar. 12 Post-Hearing Memorandum of Deft. Punta Gorda Isles, Inc. and the Individual Defts. in Opposition to Plffs' Motion for a Determination that this Action may Proceed as a Class Action, fld.

Mar. 20 Deft. Coopers & Lybrand granted to and inc. 3/31/75 in which to file its Memorandum in opp. to plff's mtn for a determination that action may proceed as a class action. (HKW, J)

Mar. 28 Coopers & Lybrand granted to 4/10/75 in which to file reply brief. (HKW, J)

Apr. 10 Post Hearing Memorandum of Deft. Coopers & Lybrand—Fld. in Opposition to Plffs' Motion for a Determination that this Action may Proceed as a Class Action.

Apr. 16 Plffs granted to and inc. 5/16/75 in which to file their post-hearing reply brief in support of their motion for class action determination.

May 14 Plffs granted up to and inc. 5/28/75 in which to file reply briefs in support of their motion for class action determination.

May 26 Motion of Plffs to Amend Count I of First Amended Complaint by Interlineation.

May 26 Amendment to Plffs' First Amended Complaint—fld.

May 26 Plffs' Post-Hearing Reply Brief Supporting Class Action Determination—fld.

June 6 Mtn of 5/28/75 submitted to Judge Wangelin.

June 17 Rejoinder of the Deft Punta Gorda Isles, Inc., & the Indiv. Defts to Plffs' Post-Hearing Reply Brief Supporting Class Action Determination—fld.

June 19 Memorandum and Order Filed—Ordered plffs motion to certify as class action pursuant to Rule 23, is granted, Lawsuit is certified as class action pursuant to Rule 23(B)(3) and Further Ordered case stayed pending final determination of matters to be dealt with in Courts show cause order attached. Copy mailed to Bryan Cave etc. and to Peper Martin, etc.

June 19 Show Cause Order to Anderson, Green, Fortus & Lander as Firm and to Mr. Martin M. Green personally Ordered to Show Cause Why Should Not Be Enjoined From Acting as Counsel for the Class. Hearing Concerning This Matter Will Be Held 10 AM 7/11/75. Copy of Show Cause order mailed to Bryan Cave etc and to Peper, Martin, etc alongwith copy of above memorandum and Order. Copy of Memorandum and Order and Show Cause Order delivered to Office U.S. Marshal for service on Anderson, Green, Fortus & Lander as a Firm and for service on Martin M. Green, individually—filed.

June 23 Return of OSC—fld. executed on Martin Green on 6/20/75.

June 23 Return of OSC—fld. executed on Anderson, Green. For Fortus & Lander on 6-20-75.

June 27 Motion of Martin M. Green and Anderson, Green, Fortus and Lander to Withdraw as Attys. for Plffs—Fld.

June 30 Memorandum for Clerk—Fld. Mtn of attys Green, et al to withdraw as Plffs attys. "So Ordered, HKW, J)" Attys. of record notified.

June 30 Entry of Appearance of Jared Spectrie, Milberg & Weiss, N.Y., N.Y. and Local Counsel Richard L. Ross, fld and approved. Attys. of record notified.

July 25 Motion to Dissolve Stay Orders—Fld by plffs.

Aug. 20 Mtn for Reconsideration, or in the Alternative, for Modification in View of the Appearance of New Counsel & Mtn to Modify & Supporting Suggestions—fld by deft Coopers & Lybrand, by leave.

Aug. 20 Motion for Reconsideration, or in the Alternative, for Modification in View of the Appearance of New Counsel—Fld by defts. Coopers & Lybrand.

Aug. 20 Motion to Modify—Fld by defts. Coopers & Lybrand.

Aug. 20 Suggestions in Support of Deft's Motions—Fld. by defts. Coopers & Lybrand.

Aug. 22 Suggestions of Punta Gorda Isles, Inc., and of the Indiv. Defts. in Support of the Motions by Cooper & Lybrand to Reconsider and/or Modify—Fld.

Aug. 14 Mtn to Amend Ct. 1 fld 5/28/75—Submitted to Judge Wangelin.

Aug. 26 Upon plffs application, plff granted to 9/5/75 to file briefs, in opp. to Mtn for Reconsideration, etc.—In memo for clerk, fld. (HKW, J)

Aug. 28 Mtn for Reconsideration, etc. fld 8/20/75 submitted to Judge Wangelin.

Sept. 4 Mtns fld 8/20/75 submitted to Judge Wangelin.

Sept. 5 Memorandum of Law in Opposition to Defts Motion to Amend This Court's Prior Decision on the Class Action With Affidavits of Cecil Livesay, Dorothy Livesay and Melvyn I. Weiss—Fld. by Plffs.

Sept. 8 Deft. Coopers & Lybrand granted to and inc. 9/22/75 in which to reply to plffs' responsive brief and pleadings with respect to defts' Mtns to Modify and Reconsider—In Memo for Clerk, fld. (HKW, J)

Sept. 11 Response of Deft. Punta Gorda Isles, Inc. and Individual Defts. to the Affidavit of M. I. Weiss and to Plffs' Memorandum of Law—Fld.

Oct. 22 Deft. Coopers & Lybrand's Reply Memorandum in Support of Its Motions for Reconsideration & Modification—Fld.

Oct. 23 Memorandum & Order—Fld. Plffs' mtn to dissolve Ct's Orders staying discovery and staying proceeding granted insofar as allowing discovery to Proceed as to names and addresses of members of the class.

Oct. 23 Memorandum & Order—Defts' Mtn to modify Ct's Order by defining the members of the class to include those defined in stipulation, etc. Granted: Defts' mtn to modify Ct's Order by defining those issues suitable for class action held in abeyance until such time as the period given in notice to be sent out to

members of class to petn the Ct. or to intervene expired: Parties shall submit proposed drafts of notice to be sent out to the class members within 30 days from date of this Order: and Plff directed to join the additional parties deft. for the reason stated, subject only to determination made by this ct in an in-camera conference if requested by Plffs' counsel. Copy of order sent attys. of record.

Nov. 21 Proposed form of Notice of Class Members in Case—Fld.

Nov. 24 Letter re proposed Class and Proposed Notice—Received.

Dec. 5 Proposed form of notice of Class Action fld. 11/21/75—Submitted to Judge Wangelin.

1976

Jan. 6 Proposed Notice of Pendency of Class Action, etc.—Mailed by Judge Wangelin to attys.

Mar. 1 Proposed Notice of Pendency of Class Action—Mailed attys. Attys. to respond no later than 3/26/76.

Apr. 9 Letter re Copy of Notice of Pendency as Class Action which counsel for plff will issue, etc.—Mailed attys. of record.

July 20 Ptf's Second Request for Production of Documents from Dft. Punta Gorda Isles, Icn. Fld.

July 23 Motion of Dft. Coopers and Lybrand to Decertify Class Action—Fld.

Suggestions in Support of Motion to Decertify Class —Fld.

Aug. 8 Plffs' Memorandum of Law in Support of Their 2nd Request for Production of Documents from Deft. Punta Gorda Isles, Inc.—Fld.

Aug. 9 Objections of Deft. Punta Gorda Isles, Inc. to Plffs' Second Request for Production of Documents—Fld.

Aug. 16 Memorandum of Deft. Punta Gorda Isles, Inc., in Opposition to Plffs' Second Request for Production of Documents—Fld.

Aug. 16 Cross Motion to Dissolve Stay Order and to Compel Production of Documents by Deft, Punta Gorda Isles, Inc.—Fld. by Plff.

Aug. 16 Plffs' Memorandum of Law in Opposition to Motion of Deft. Coopers & Lybrand to Decertify—Fld by Plffs.

Aug. 16 Affidavit of Plffs in Opposition to Motion to Decertify Class Action—Fld.

Aug. 16 Affidavit of Jerome M. Congress in Opposition to Motion of Deft. Coopers & Lybrand to Decertify Class Action—Fld.

Aug. 18 Response of Deft. Coopers & Lybrand to Plffs' Memorandum of Law in Support of Their 2nd Request for the Production of Documents From Deft. Punta Gorda—Fld.

Aug. 16 Mtn. fld 7/23/76 submitted.

Aug. 23 Plff granted until 8/30/76 to reply to response of Cooper & Lybrand etc.—In Memo for Clerk, fld.

Aug. 23 Memorandum of Deft & Indiv. Defts in Opposition to Plffs' Motion to Dissolve Stay Order—Fld.

Aug. 23 Memorandum of Deft. Coopers & Lybrand in Opposition to Plffs' Motion to Dissolve Stay Order—Fld.

Aug. 23 Supplemental Suggestions in Support of Deft. Coopers & Lybrand's Motion to Decertify—Fld.

Aug. 30 Reply Memorandum in Support of Their 2nd Request for Production of Documents From Detf. Punta Gorda Isles, Inc.—Fld by Plffs.

Sept. 1 Memorandum (HKW, J)—Fld.

Order (HKW, J)—Fld. Motion of various defts. to decertify case as class action Granted. Action Is Decertified as a Class Action. Matter to Proceed to Trial Only Upon Indiv. Claims of Cecil & Dorothy Livesay. Action to Be Set for Trial at Later Date. All Restrictions on Discovery Shall Be Lifted and That Discovery With Regards to Individual Claims of Cecil and Dorothy Livesay Shall Proceed in Normal Fashion. Copy of order and Memo sent attys.

Sept. 3 Deft Coopers & Lybrand's Request for Production of Documents Pursuant to F.R.C.P. 34 Directed to Plff—Fld.

Sept. 3 Interrogatories Directed to Plffs by Deft. Coopers & Lybrand—Fld.

Sept. 22 Plffs' Request for Production of Documents—Fld.

Sept. 28 Transcript of Conference in Chambers—Fld by Off. Ct. Reporter on 7/26/76.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Case No. 76-1881

Appeal From Eastern District of Missouri

Title of Case

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Appellants,

vs.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),
Appellees.

Date	Filings—Proceedings
1976	
Sept. 30	Certified copies of notice of appeal & docket entries rec'd from D.C. (1)
Sept. 30	Request for docketing fee (2)
Oct. 14	Docketed appeal.
Oct. 14	Appearance for appellants. (3)
Oct. 14	Designation of Record and Statement of Issues. (4)
Oct. 18	Appearance appellees (5)

Oct. 18 Appellees' Joint Designation of Additional Contents of Appndx to Br. (6)

Oct. 22 Appearance appellants (7)

Oct. 29 Joint motion of appellees to dismiss for lack of jurisdiction. (8)

Oct. 29 Memorandum in support of joint motion. (9)

Nov. 2 Received letter from Karen Holm correcting errors in mo to dismiss.

Nov. 11 Memorandum of appellants in opposition to joint mo of appellees to dismiss. (10)

Nov. 15 Received copy of memo of appellants in opposition to joint mo of appellees to dismiss. Signed copy by all counsel to be forwarded.

Nov. 19 Reply Memorandum in Support of Appellees' Joint Motion to Dismiss. (11)

Nov. 22 Appndx (2 vol.) (12)

Nov. 22 Brf aplnts (13)

Nov. 22 Ser w/apndx & brf aplnts (14)

Dec. 15 Law Clerk Memo w/1906

Dec. 20 Transferred to January session. w/1906

Dec. 23 Brf aplees Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Jones, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., & John W. Douglas (15)

Dec. 27 Rec'd ser for brf aplees (16)

Dec. 28 Brf aplee Coopers & Lybrand (17)

Dec. 28 Ser w/brf aplee (18)

1977

Jan. 3 Mo applnt for ext of time to file reply brief, with 1906. (19)

Jan. 5 Received Large Box of Original Files and Exhibits From Dist Ct, w-1906.

Jan. 7 Order: Appellants-petitioners may have thru January 10 to serve and file reply brief (20)

Jan. 10 Rep brf applnts-petitioners w/1906 (21)

Jan. 10 Ser w/rep brf (22)

Jan. 13 Argued and submitted (with 1906) to Judges Heaney, Stephenson, Stuart. Melvyn I. Weiss for appellant; John J. Hennelly for Coopers & Lybrand; William A. Richter for Punta Gorda Isles, et al. Rebuttal by Mr. Weiss.

Feb. 2 Received and forwarded to court letter from Martin M. Green.

Feb. 4 Received and forwarded to court letter from Veryl Riddle.

Mar. 4 Opinion by Judge Stephenson (Published) (23)

Mar. 4 Judgment: Judgment of district court is reversed and remanded to district court for proceedings consistent with opinion (24)

Mar. 18 Petition of appellees (all appellees except Coopers & Lybrand) for rehearing en banc and rehearing with service. (25)

Mar. 18 Petition of appellee (Coopers & Lybrand) for rehearing en banc and rehearing. (26)

Mar. 18 Certificate of service of petition for rehearing. (27)

Mar. 28 Order: Petitions of appellees for rehearing en banc and rehearing are denied (28)

Apr.	4	Mo appellees for stay of mandate. (29)
Apr.	8	Appellants' response to mo of appellees for stay of mandate. (30)
Apr.	12	Order: Appellees' stay for issuance of mandate denied (31)
Apr.	13	Mandate issued.
Apr.	14	Receipt for mandate (32)
Apr.	15	Appellants' bill of [illegible]. (33)
Apr.	15	Order: Sum of $1,836.19 for clerk's docketing fee, cost of preparation of appendix, appellants' brief and reply brief be taxed in favor of appellants for collection from appellees in district court (34)
June	29	Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-1837 (as of 6/23/77) with No. 76-1906. (35)
June	30	Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-1836 (as of 6/23/77) with No. 76-1906. (36)
Nov.	18	Order of Supreme Court granting certiorari in Case No. 76-1837 (w/76-1906) (37)
Nov.	18	Order of Supreme Court granting certiorari in Case No. 76-1836 (w/1906) (38)

Case No. 76-1906

Appeal From Petition for Writ of Mandamus

Title of Case

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Petitioners,

vs.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),
Respondents,

and

Honorable H. Kenneth Wangelin, Judge, United States District Court for the Eastern District of Missouri, Eastern Division,
Respondent.

Date		Filings—Proceedings
1976		
Oct.	21	Docketed case
Oct.	21	Petition for Writ of Mandamus (Orig. & 4 with service) (1)
Oct.	21	Exhibits to Petition for Writ of Mandamus (5 copies) (2)
Oct.	26	Appearance respondent (3)
Oct.	26	Appearance respondent (4)
Nov.	3	Appearance petitioners (5)

Nov. 3 Appearance petitioners (6)

Nov. 18 Response of counsel for respondent Punta Gorda Isles, Inc., and individual respondents to petition for writ of mandamus. (7)

Nov. 18 Answer of Cooper and Lybran to Plaintiffs' Petition for Writ of Mandamus. (8)

Dec. 15 Law Clerk Memo. w/1881

Dec. 20 Transferred to January session. w/1881

1977

Jan. 3 Mo petitioners for ext of time to file reply brief, w/1881.

Jan. 5 Received Large Box of Original Files and Exhibits From Dist Ct, w-1881.

Jan. 7 Order: Appellants-petitioners may have thru January 10 to serve and file reply brief w/76-1881

Jan. 10 Rep brf applnts-petitioners w/1881

Jan. 10 Ser w/rep brf

Jan. 13 Argued and submitted (with 1881) to Judges Heaney, Stephenson, Stuart. Melvyn I. Weiss for appellant; John J. Hennelly for Coopers & Lybrand; William A. Richter for Punta Gorda Isles, et al. Rebuttal by Mr. Weiss.

Mar. 4 Opinion by Judge Stephenson (Published) w/76-1881. Petition for writ of mandamus is dismissed.

June 29 Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-1837 (as of 6/23/77) with No. 76-1881.

June 30 Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-1836 (as of 6/23/77) with No. 76-1881.

Nov. 18 Order of Supreme Court granting certiorari in Case No. 76-1837 (w/76-1881)

Nov. 18 Order of Supreme Court granting certiorari in Case No. 76-1836 (w 76-1881)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

PLAINTIFFS' FIRST AMENDED COMPLAINT

(Filed September 5, 1973)

COUNT I

Jurisdiction, Venue and Nature of Action

1. This Court has jurisdiction of this action under Section 22(a) of the Securities Act of 1933, as amended ("1933 Act"), 15 U.S.C. Section 77v and Section 27 of the Securities Exchange Act of 1934, as amended ("Exchange Act"), 15 U.S.C. 78aa;

2. Plaintiffs bring this action under and pursuant to Sections 11, 12(2) and 17(a) of the 1933 Act, (15 U.S.C. §§ 77k, 77 l(2) and 77q(a)), Sections 10(b) and 20(a) of the Exchange Act, (15 U.S.C. 78j(b) and 78t(a)) and Rule 10b-5 promulgated by the Securities and Exchange Commission ("SEC") thereunder (15 U.S.C. 78(j), 17 C.F.R. 240.10b-5);

3. Many of the acts and much of the conduct charged herein, including the preparation and distribution of Prospectuses pre-

pared by or with the aid, participation, acquiescence, encouragement, cooperation or assistance of the defendant Punta Gorda Isles, Inc. (hereinafter "Punta Gorda"), defendant Coopers & Lybrand and the individual defendants (all of the defendants will hereinafter be referred to collectively as "the defendants") and the sale of securities offered by the Prospectus occurred in the Eastern District of Missouri;

4. In connection with the acts and conduct alleged herein defendants directly and indirectly used the means and instrumentalities of interstate commerce and of the mails and the facilities of a national securities exchange registered with the SEC pursuant to the Exchange Act;

Parties

5. Plaintiffs Cecil Livesay and Dorothy Livesay are individuals residing in the City of Glendale, State of Missouri, who, as a result of the wrongs hereinafter alleged, purchased $5,000.00 worth of Punta Gorda's 6% Convertible Subordinated Debentures, due 1992 ("the debentures") and 100 shares of the common stock of Punta Gorda at a price of $18.00 per share, or $1800.00. The debentures and common stock were purchased on or about May 2, 1972, in connection with a Punta Gorda public offering of that date;

6. Defendant Punta Gorda is a corporation duly organized and existing under the laws of the State of Florida and maintains its executive offices at 1625 West Marion Avenue, Punta Gorda, Florida. The common stock of Punta Gorda is traded on the American Stock Exchange and the debentures are traded on the American Bond Exchange. The Company is principally in the business of developing and selling homesites at retail on the installment plan basis. In a typical transaction, the customer pays 5-10% down on the purchase price of a homesite, and then pays the balance in installments over a ten year period;

7. Defendant Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery) a partnership, is a national accounting firm with offices in major cities throughout the United States. Said defendant maintains an office at 411 North Seventh Street, St. Louis, Missouri, within the Eastern District of Missouri. At all material times, including the times of the wrongs alleged herein, defendant Coopers & Lybrand provided accounting services to defendant Punta Gorda; defendant Coopers & Lybrand was at all material times the auditor for Punta Gorda and certified certain of its financial statements, including the financial statements used in connection with the May 2, 1972, public offering referred to herein;

8. Defendant Wilber H. Cole is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the President and a director of Punta Gorda, who personally sold 116,010 shares of the common stock of Punta Gorda pursuant to the May 2, 1972, Prospectus;

9. Defendant Alfred M. Johns is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the Chairman of the Board, Secretary and a director of Punta Gorda, who personally sold 55,560 shares of the common stock of Punta Gorda pursuant to the May 2, 1972, Prospectus;

10. Defendant Robert J. Barbee is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the Vice President and a director of Punta Gorda;

11. Defendant Samuel A. Burchers, Jr. is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda,

Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein; was the Vice President and a director of Punta Gorda;

12. Defendant Russell C. Faber is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint, herein, including the times of the wrongs alleged herein, was the Financial Vice President and a director of Punta Gorda;

13. Defendant John Matarese is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the Vice President of Punta Gorda;

14. Defendant Robert C. Wade is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the Treasurer of Punta Gorda;

15. Defendant Earl Drayton Farr, Jr. is an individual who maintains an office at 115 West Olympia Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was general counsel and a director of Punta Gorda;

16. Defendant John W. Douglas, D.D.S. is an individual who maintains an office at 209 N.E. Conway, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was a director of Punta Gorda;

Class Action Allegations

17. During the period beginning May 2, 1972, and for at least several days thereafter, pursuant to the Registration State-

ment which was declared effective by the SEC on or about May 2, 1972, an undetermined number of persons purchased $15,000,000.00 principal amount of Punta Gorda's debentures and 171,570 shares of its common stock at a price of $18.00 per share, aggregating an additional $3,088,260.00; all of the foregoing debentures and common stock were purchased in reliance upon and as a result of the information contained in the aforesaid Registration Statement;

18. The class is defined as all of those persons who purchased the above-described debentures and shares of the common stock of Punta Gorda during the underwriting and public offering thereof which occurred on and following May 2, 1972;

19. Plaintiffs are informed and believe that the number of such purchasers of the said debentures and shares of common stock of Punta Gorda are so numerous that joinder of all of the class members in this action is impracticable;

20. Plaintiffs are adequate representatives of the class inasmuch as they have the same identical interests as all of the members of the class, and they will fairly and adequately protect the interests of the class;

21. There are questions of law and fact common to the class which include, *inter alia*, the following:

(a) Whether the defendants herein entered into and engaged in a course of conduct which fraudulently induced plaintiffs and the members of the class to purchase the debentures and shares of the common stock of defendant Punta Gorda for a grossly excessive consideration;

(b) Whether defendants, in order to effectuate such course of conduct, employed devices, schemes or artifices to defraud, obtain money or property by means of untrue statements of material facts or by omitting to state material facts necessary

in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices or courses of conduct which operated as a fraud and deceit on the purchasers of the said debentures and common stock of Punta Gorda in violation of Sections 11, 12(2) and 17(a) of the 1933 Act:

(c) Whether defendants, in order to effectuate such course of conduct, and in connection with such course of conduct, engaged in acts and conduct in violation of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder by the SEC;

22. The foregoing questions of law and fact are common to the class and predominate over questions affecting only individual members thereof; the class action herein is superior to other methods for a fair and efficient administration of the controversy since the class is so numerous and geographically disbursed that joinder of all the members is impractical:

Cause of Action

Sections 11, 12(2) and 17(a) of the Securities Act of 1933

23. Plaintiffs allege that during the period of at least November 1, 1971, and possibly earlier, the exact dates being unknown to plaintiffs, defendants engaged in an unlawful combination and course of business pursuant to which defendants, among other matters, employed devices, schemes and artifices to defraud, obtain money by means of untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and courses of business and conduct which operated as a fraud and deceit upon purchasers of the debentures and common stock of Punta Gorda, all in violation

of Sections 11, 12(2) and 17(a) of the 1933 Act. The purpose and effect of these activities caused the plaintiffs and the members of the class they represent to purchase debentures and common stock of Punta Gorda for grossly excessive consideration ($1,000.00 for each debenture and $18.00 per share for the common stock) pursuant to the Registration Statement declared effective by the SEC on or about May 2, 1972;

24. The fraudulent practices and the devices utilized by the defendants in connection with and in order to effectuate the aforesaid result (the sale of $15,000,000.00 worth of debentures by Punta Gorda, and the sale by defendants Cole and Johns of 171,570 shares of the common stock of Punta Gorda at $18.00 per share, aggregating $3,088,260.00) consisted of, *inter alia*, the following false representations by defendants, knowing them to be false when made, and the following concealments of or failures to disclose material facts necessary, in order to make the statements made, in the light of the circumstances under which they were made, not misleading to plaintiffs and the members of the class, all or part of which are contained in (or omitted from) the Registration Statement of Punta Gorda and the Prospectus which is a part of such Registration Statement, dated May 2, 1972:

(a) The defendants failed adequately to disclose and falsely represented the financial condition of Punta Gorda;

(b) The defendants failed adequately to disclose and falsely represented the results of operations, including the results of operations of Punta Gorda at least for the following periods:

(i) The years ending December 31, 1967, December 31, 1968, December 31, 1969, December 31, 1970, and December 31, 1971;

(ii) The three months period ending March 31, 1971, and March 31, 1972;

(c) The defendants failed adequately to disclose that new accounting rules and guidelines had been proposed by the American Institute of Certified Public Accountants and were imminent with respect to Punta Gorda's operating statements, and that they would require a materially adverse restatement, retroactively applied, of the earnings of Punta Gorda for 1967 through 1971 and for the first three months of 1972. Notwithstanding such fact, the Prospectus falsely states that "The Company is unable to predict when any changes in accounting practices applicable to the Company's business will be made, or what effect, if any, such changes will have on the Company's financial statements," and that ". . . it is the Company's opinion that the accounting practices currently followed by it present fairly the Company's financial conditions and the results of its operations and that no material changes in the Company's accounting practices are warranted."

(d) The defendants failed to disclose to the plaintiffs and the members of the class what the results of Punta Gorda's operations for the period beginning 1967 through 1971 and for the first three months period of 1972 would have been on a pro forma basis following Punta Gorda's adherence to the new accounting rules and guidelines applicable to its operating statement. The following chart sets forth the earnings of Punta Gorda for the years 1967 through 1971 as set forth in the Prospectus and the earnings for the same period, as restated approximately six months thereafter, under the contemplated revised accounting rules and guidelines:

Year	Net Income Shown in Prospectus	Restated
1968	$ 407,918 ($.28 per share)	$ 179,831 ($.12 per share)
1969	$1,037,385 ($.66 per share)	$ 312,733 ($.20 per share)
1970	$1,581,564 ($.86 per share)	$ 541,864 ($.29 per share)
1971	$3,360,855 ($1.72 per share)	$1,968,696 ($1.06 per share)

(e) The defendants failed to openly disclose that Punta Gorda operates at a loss for federal income tax purposes, and that its earnings are based entirely on anticipated receipts from the installment contracts, and in this connection the Prospectus fails to include in the statements of income a comparative presentation of Punta Gorda's reduced income and reduced income per share as a result of the accounting principles used for its federal income tax returns, which do not give recognition to income from the installment contracts until cash is actually received. Instead, the defendants, in a false and misleading way, provided a table showing a difference between "Financial Statement Basis Over Income Tax Basis," showing, for example, differences in 1971 in the magnitude of $3,418,-256.00 and a difference per share of $1.83 without stating that earnings are lower by such amounts than those shown on the statements of income preceding, utilizing the term "difference" to conceal the fact of "over-statement" of earnings as a result of accrual of installment sales as income when made;

(f) The statement of income contained in the Prospectus contains a presentation of the ratio of earnings to fixed charges prior to the offering, showing a ratio of earnings which were 8.33 times fixed charges in the year 1971, with a pro forma earnings ratio to fixed charges after the offering of 4.05 for such year. Both of these ratios, which tend to indicate substantial coverage for future fixed charges of Punta Gorda, are false and misleading because they are not based on actual cash flow available for payment of fixed charges, but are based principally upon book earnings resulting from installment sale contracts, where the cash flow is inadequate to yield anywhere near the coverage of fixed charges represented, and where the risk of default flowing from any inability of Punta Gorda to perform its obligations under the sale contract is real and substantial;

(g) The defendants failed and omitted to state that Punta Gorda is and will continue to be materially adversely affected by

recent ecological regulations in the State of Florida preventing future development of homesites with either saltwater or fresh water frontage, stating that ". . . the Company has shifted its emphasis to projects in which homesites will be located on parkways or freshwater lakes and creeks," and that "the Company will be dependent in its ability to develop such properties upon the obtaining of requisite regulatory approvals and complying with applicable laws and regulations." In fact, laws enacted, as enforced on the effective date of the Prospectus, tend to indicate that such approvals will be extremely difficult, if not impossible, to obtain, and that the State of Florida, in order to preserve the ecology of its "wet areas" intends to prevent the form of land development involving dredging and cutting of canals and waterways heretofore engaged in by Punta Gorda. As of the writing of this Complaint, Punta Gorda is virtually at a standstill in obtaining additional properties with water frontage, for development, and its cash flow, earnings and consequent ability to comply with its obligations under prior buy-and-sell contracts are being materially and possibly irreparably, adversely affected. As a result of the crippling effect of such ecological regulation upon future sales, and cash flow, the ability of Punta Gorda to meet its fixed obligations to existing creditors and prior purchasers of homesites is in severe jeopardy, and no disclosure of this material risk is contained in the Prospectus;

(h) In addition to the restrictive effect of the foregoing regulations on future development and sale of land with water frontage, Punta Gorda's ability to sell any lots will be impaired, because of the difficulty involved and lower price of lots without water frontage and the increased costs of such sales in commissions and other expenses, all of which will have a further material adverse effect upon Punta Gorda's cash flow and income;

(i) The defendants falsely represented that Punta Gorda had not knowingly made any untrue statement of a material fact or omitted to state any material fact required to be stated in the

Registration Statement, including the Prospectus, or necessary to make the statements therein not misleading;

25. In connection with and in furtherance of the scheme to defraud, as aforesaid, the defendants engaged in acts and conduct which they combined and agreed to do and each of the defendants aided and abetted, acquiesced, encouraged, cooperated and or assisted in the effectuation of such combination and conspiracy;

26. By reason of the foregoing acts and conduct, plaintiffs and the members of the class herein purchased $15,000,000.00 worth of Punta Gorda debentures and 171,570 shares of Punta Gorda's common stock at $18.00 per share in the public offering of May 2, 1972. By reason of said acts and conduct, plaintiffs and the members of the class paid an excessive and inflated price for the said debentures and common stock which they so purchased. Recently the common stock of Punta Gorda has been trading on the American Stock Exchange at prices in the vicinity of $8.00 per share and the debentures have been trading on the American Bond Exchange at prices in the area of $600.00 per debenture. Plaintiffs on or about October 6, 1972, sold their said 100 shares of Punta Gorda's common stock at a price of $8.00 per share, and thus, sustained a loss of more than $1,000.00 with respect thereto. On or about the same date plaintiffs sold their five debentures, which cost them $5,000.00, for $3,375.00, thus sustaining a loss of approximately $1600.00;

27. That by reason of the aforesaid, the plaintiffs and all the members of the class have been damaged in amounts, which although easily ascertainable, are presently undetermined;

Wherefore, plaintiffs demand:

A. Judgment against all of the defendants, jointly and severally, and in favor of plaintiffs and each member of the class for damages in the amount determined to have been sustained by

plaintiffs and each member of the class, together with interest and costs of suit, including a reasonable attorney's fee, and

B. Such other and further relief as may be necessary and appropriate.

COUNT II

Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5

28. Paragraphs 1 through 27 of Count I of this Complaint are realleged and incorporated herein by reference as though fully set forth;

29. Count II of this action is brought under and pursuant to Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder;

30. In connection with the Registration Statement referred to above, including the Prospectus contained therein, defendants engaged in an unlawful combination and in conduct pursuant to which they, *inter alia*, engaged in other acts, transactions, practices and courses of business which operated as a fraud and deceit upon plaintiffs and each member of the class, and made various untrue statements of material facts and omitted to state material facts necessary to make the statements made not misleading to plaintiffs and the members of the class, all in violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. The fraudulent practices and devices, utilized by the defendants in connection with and in order to effectuate the aforesaid, consisted of knowingly making false representations and intentional concealment of and failure to disclose material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading to plaintiffs and members of the class;

31. All defendants have encouraged, cooperated, aided and abetted, acquiesced, assisted and participated in the preparation

of and issuance of a Registration Statement, including a Prospectus, and the sale of shares and debentures pursuant to such Registration Statement. As a result, defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder in that they employed devices, schemes and artifices to defraud, obtain money and property by means of untrue statements of material facts, and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and courses of business which operated as a fraud and deceit upon purchasers with respect to the allegations more specifically set forth in paragraph 24 of Count I of this Complaint, which are incorporated herein by reference;

32. The individual defendants were at all times material to the Complaint controlling persons of Punta Gorda within the meaning of Section 20(a) of the Exchange Act.

Wherefore, in Count II of this Complaint plaintiffs demand:

A. Judgment against each defendant, jointly and severally, and in favor of plaintiffs and each member of the class for damages in the amount determined to have been sustained by plaintiffs and each member of the class, together with interest and costs of suit, including a reasonable atttorney's fee, and

B. Such other and further relief as may be necessary and appropriate.

ANDERSON, GREEN, FORTUS & LANDER
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Attorneys for Plaintiffs
Suite 938, Chromalloy Plaza
120 South Central
Clayton, Missouri 63105
862-6800

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ANSWER TO FIRST AMENDED COMPLAINT OF DEFENDANT COOPERS & LYBRAND

(Filed October 10, 1973)

Comes now defendant Coopers & Lybrand and for its Answer to Plaintiffs' First Amended Complaint states to the Court as follows:

1. For answer to paragraph 1, this defendant admits that plaintiffs seek to invoke the subject matter jurisdiction of this Court pursuant to the statutes cited in such paragraph 1.

2. For answer to paragraph 2, this defendant admits that plaintiffs seek to impose liability against it pursuant to the statutes and Rule cited in such paragraph 2.

3. For answer to paragraphs 3 and 4, this defendant denies each and every allegation contained therein.

4. For answer to paragraph 5, this defendant admits that a public offering of Punta Gorda common stock and 6% Convertible Subordinated Debentures, due 1992 (the "debentures") was made by certain underwriters pursuant to a Prospectus with an effective registration date with the Securities and Exchange Commission of May 2, 1972. Except as so expressly admitted, this defendant denies each and every allegation contained in such paragraph 5.

5. For answer to paragraph 6, this defendant admits that defendant Punta Gorda Isles, Inc. ("Punta Gorda") is a corporation duly organized and existing under the laws of the State of Florida and maintains its executive offices at 1625 West Marion Avenue, Punta Gorda, Florida. Except as so expressly admitted, this defendant is without sufficient knowledge or information to answer the remaining allegations of such paragraph 6 and, therefore, denies same.

6. For answer to paragraph 7, this defendant admits that it was formerly known as Lybrand, Ross Bros & Montgomery, that it is a partnership, that it is a national accounting firm with offices in major cities throughout the United States and maintains an office at 411 North 7th Street, St. Louis, Missouri, that from time to time it has provided accounting services to defendant Punta Gorda, that from time to time it has been auditor for defendant Punta Gorda and has certified certain of its financial statements, and that it examined the balance sheet of Punta Gorda as of December 31, 1971 and the related statements of stockholders' equity and income for the five years then ended, and the statement of changes in financial position for the three years then ended, all of which are contained in the Prospectus for the May 2, 1972 offering of common stock and debentures, and certified in the Prospectus for such offering that such balance sheet and statements presented "fairly the financial position of Punta Gorda Isles, Inc. at December 31, 1971, and the results of its operations for the five years then ended, and changes in financial position for the three years then ended, in conformity with generally accepted accounting principles applied on a consistent basis." Except as so expressly admitted, this defendant denies each and every allegation contained in such paragraph 7.

7. For answer to paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, this defendant is without sufficient knowledge or information to answer the allegations in such paragraphs and, therefore, denies same.

8. For answer to paragraphs 18, 19, 20, 21, 22 and 23, this defendant denies each and every allegation contained therein.

9. For answer to the first paragraph and clauses (a) and (b) of paragraph 24, this defendant denies each and every allegation contained therein.

10. For answer to clause (c) of paragraph 24, this defendant admits that the Prospectus contains the following statement:

> "The Company is unable to predict whether any changes in accounting practices applicable to the Company's business will be made or what effect, if any, such changes will have on the Company's financial statements. However, it is the Company's opinion that the accounting practices currently followed by it present fairly the Company's financial condition and the results of its operations and that no material changes in the Company's accounting practices are warranted."

Except as so expressly admitted, this defendant denies each and every allegation contained in such clause (c).

11. For answer to clause (d) of paragraph 24, this defendant admits that the earnings figures for the years 1968, 1969, 1970 and 1971 quoted in such clause do appear in the Prospectus, and the earnings per share figures recited in such clause do appear in such Prospectus as "fully diluted net income per share." Except as so expressly admitted, this defendant denies each and every allegation contained in such clause (d).

12. For answer to clause (e) of paragraph 24, this defendant admits that the Prospectus contains a table comparing the results for the accrual method of accounting for financial reporting with the accounting used for Federal income tax purposes, that such table shows for the year 1971 a difference of financial statement basis earnings over income tax basis earnings of $3,418,256 and a difference in earnings per share for such year of $1.83. Except as so expressly admitted, this defendant denies each and every allegation contained in said clause (e).

13. For answer to clause (f) of paragraph 24, this defendant admits that the Prospectus contains a presentation captioned ratio of earnings to fixed charges of 8.33 for the year 1971, with a pro forma ratio of earnings to fixed charges of 4.05 for 1971. Except as so expressly admitted, this defendant denies each and every allegation contained in said clause (f).

14. For answer to clause (g) of paragraph 24, this defendant admits that the following statement is contained in the Prospectus:

> "Management of the Company believes that compliance with the above statutory requirements and agency regulations related to environmental quality may materially affect the ability of the Company as well as other land developers to develop an additional inventory of homesites with frontage on salt water bodies. As a result, the Company has shifted its emphasis to projects in which homesites will be located on parkways or fresh water lakes and creeks. Such projects are also subject to the above laws, regulations and regulatory agencies and, to the extent that dredging is required, fill is needed or sewage disposal facilities are required to be constructed, the Company will be dependent in its ability to develop such properties upon the obtaining of requisite regulatory approvals and complying with applicable laws and regulations."

Except as so expressly admitted, this defendant denies each and every allegation contained in such clause (g).

15. For answer to clause (h) of paragraph 24, this defendant is without sufficient knowledge or information to answer the allegations contained therein and, therefore, denies same.

16. For answer to clause (i) of paragraph 24, this defendant denies the allegations contained in such clause.

17. For answer to paragraph 25, this defendant denies each and every allegation contained in such paragraph.

18. For answer to paragraph 26, this defendant is without sufficient knowledge or information to answer the allegations therein and, therefore, denies same.

19. For answer to paragraph 27, this defendant denies each and every allegation contained in such paragraph.

20. For further answer to Count I, this defendant states that such Count fails to state any cause of action upon which relief can be granted against it.

21. For further answer to Count I, this defendant states that as regards any part of the Prospectus or the Registration Statement of May 2, 1972 purporting to be made upon its authority as an expert, it had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the Prospectus and Registration Statement became effective, that the statements therein were true, and that there was no omission to state a material fact required to be stated therein or necessary to make the statements not misleading.

22. For further answer to Count I, this defendant states that the damages, if any, suffered by the plaintiffs represent other than the depreciation in value of their securities resulting from those parts of the Prospectus or Registration Statement, with respect to which this defendant's liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading. There were no such untruths or omissions in the Prospectus or Registration Statement.

23. For further answer to Count I, this defendant states that plaintiffs failed to commence their action within one year after the discovery of the alleged untrue statements or omissions, or after such discovery should have been made by the exercise of reasonable diligence.

24. For answer to paragraph 28, this defendant admits and denies in the same manner as it admitted and denied the allegations contained in paragraphs 1 through 27 of Count I, which paragraphs are realleged and incorporated by reference into such paragraph 28.

25. For answer to paragraph 29, this defendant admits that plaintiffs seek to assert a cause of action under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10(b)-5 promulgated thereunder.

26. For answer to paragraphs 30 and 31, this defendant denies each and every allegation contained in such paragraphs.

27. For answer to paragraph 32, this defendant is without sufficient knowledge or information to answer the allegations contained therein and, therefore, denies same.

28. For further answer to Count II, this defendant states that such Count fails to state a claim upon which relief can be granted against it.

Wherefore, having fully answered, this defendant prays that it be dismissed with its costs.

BRYAN, CAVE, McPHEETERS &
McROBERTS
By VERYL L. RIDDLE
CHARLES G. SIEBERT
JOHN J. HENNELLY
500 North Broadway
St. Louis, Missouri 63102
231-8600
Attorneys for Defendant
Coopers & Lybrand

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

ANSWER
Of Defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas to Plaintiffs' First Amended Complaint.

(Filed October 9, 1973)

Come now the Defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, and for their answer to Plaintiffs' First Amended Complaint state as follows:

COUNT I

1. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiffs' First Amended Complaint.

2. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' First Amended Complaint.

3. These Defendants admit that portions of the Prospectus of Punta Gorda Isles, Inc., dated May 2, 1972 ("Prospectus"), were prepared in the Eastern District of Missouri, that some of the Prospectuses were distributed in the Eastern District of

Missouri, that some of the securities offered by the Prospectuses were sold in the Eastern District of Missouri, and that these Defendants aided, participated, or acquiesced in the preparation of those Prospectuses; the Defendants deny all other allegations contained in Paragraph 3 of the Plaintiffs' First Amended Complaint.

4. These Defendants admit that the means and instrumentalities of interstate commerce and the mails were used in connection with the public offering of the securities of Punta Gorda Isles, Inc., in May 1972; these Defendants deny all allegations contained in Paragraph 4 of the Plaintiffs' First Amended Complaint.

5. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of Plaintiffs' First Amended Complaint.

6. These Defendants do not know what is meant by "typical" in Paragraph 6 of Plaintiffs' First Amended Complaint, and therefore are without knowledge or information sufficient to form a belief as to the truth of the allegation that "In a typical transaction, the customer pays 5-10% down on the purchase price of a homesite, and then pays the balance in installments over a ten year period"; these Defendants admit the other allegations contained in Paragraph 6 of the Plaintiffs' First Amended Complaint.

7. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 7 of Plaintiffs' First Amended Complaint.

8. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 8 of Plaintiffs' First Amended Complaint.

9. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 9 of Plaintiffs' First Amended Complaint.

10. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 10 of Plaintiffs' First Amended Complaint.

11. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 11 of Plaintiffs' First Amended Complaint.

12. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 12 of Plaintiffs' First Amended Complaint.

13. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 13 of Plaintiffs' First Amended Complaint.

14. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 14 of Plaintiffs' Amended Complaint.

15. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 15 of Plaintiffs' First Amended Complaint.

16. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 16 of Plaintiffs' First Amended Complaint.

17. These Defendants admit that pursuant to a Registration Statement which was declared effective by the Securities and Exchange Commission ("SEC") on May 2, 1972, $15,000,000 in principal amount of Punta Gorda Isles, Inc., Debentures and 171,570 shares of Punta Gorda Isles, Inc., Common Stock at a price of $18 per share were offered to the public. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 17 of Plaintiffs' First Amended Complaint.

18. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of Plaintiffs' First Amended Complaint.

19. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of Plaintiffs' First Amended Complaint.

20. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of Plaintffs' First Amended Complaint.

21. These Defendants deny all the allegations contained in Paragraph 21 of Plaintiffs' First Amended Complaint.

22. These Defendants deny all the allegations contained in Paragraph 22 of Plaintiffs' First Amended Complaint.

23. These Defendants admit that the Registration Statement became effective with the SEC on or about May 2, 1972, and these Defendants deny all other allegations contained in Paragraph 23 of Plaintiffs' First Amended Complaint.

24. These Defendants deny all the allegations contained in Paragraph 24 of Plaintiffs' First Amended Complaint.

25. These Defendants deny all the allegations contained in Paragraph 25 of Plaintiffs' First Amended Complaint.

26. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of Plaintiffs' First Amended Complaint that the Plaintiffs purchased and sold the Punta Gorda Isles, Inc., Debentures and Common Stock. These Defendants admit that $15,000,000 in principal amount of Punta Gorda Isles, Inc., Debentures and 171,570 shares of Punta Gorda Isles, Inc., Common Stock were offered to the public in the offering of May 2, 1972. These Defendants deny all other allegations contained in Paragraph 26 of Plaintiffs' First Amended Complaint.

27. These Defendants deny all the allegations contained in Paragraph 27 of Plaintiffs' First Amended Complaint.

COUNT II

28. For their answer to Paragraph 28, the Defendants incorporate herein by reference the responses contained in Paragraphs 1-27 of this Answer as fully as though said responses were set forth in full herein.

29. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiffs' First Amended Complaint.

30. These Defendants deny the allegations contained in Paragraph 30 of Plaintiffs' First Amended Complaint.

31. These Defendants deny the allegations contained in Paragraph 31 of Plaintiffs' First Amended Complaint.

32. These Defendants deny the allegations contained in Paragraph 32 of Plaintiffs' First Amended Complaint.

Further answering, these Defendants allege as follows:

First Defense

33. A copy of the Prospectus dated May 2, 1972, is attached to this Answer as Exhibit "A" and by reference is fully incorporated herein. A copy of Punta Gorda Isles, Inc.'s, 1972 Annual Report is attached to this Answer as Exhibit "B" and by reference is fully incorporated herein. The changes in Punta Gorda Isles, Inc.'s, accounting procedures are described on Pages 3, 18 and 19 of the 1972 Annual Report. For the reasons there stated, the differences between the income reported in the Prospectus and the income reported in the 1972 Annual Report result solely from a difference in the method of reporting and do not reflect any inaccuracy in the income figures in the Prospectus. The Prospectus contains no misstatements of material facts nor does it fail to state any facts necessary to make the statements contained therein, in the light of the circumstances under which they were made, not misleading.

Second Defense

34. These Defendants did not and do not know of any untrue statements of material facts made in connection with the sale of securities issued by Defendant Punta Gorda Isles, Inc., nor or of any omissions to state material facts necessary to make the statements, in the light of the circumstances under which they were made, not misleading. The exercise of reasonable care did not disclose and would not have disclosed any such untruth or omission, and, in fact, there were no untruths or omissions.

Third Defense

35. The Plaintiffs did not purchase any securities from these Defendants.

Fourth Defense

36. The damages, if any, suffered by the Plaintiffs represent other than the depreciation in value of their securities resulting from those parts of the Registration Statement, with respect to which they assert the liability of Defendants, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading. There were no such untruths or omissions in the Registration Statement.

Fifth Defense

37. The damages, if any, suffered by the Plaintiffs were not caused by any misstatements of material facts in the Registration Statement nor by any failure to state any material facts required to be stated therein or necessary to make the statements therein not misleading.

Sixth Defense

38. The statements and reports in the Prospectus dealing with accounting matters were made on the authority of Defendant Coopers & Lybrand as experts on such matters; as regards those statements and reports, these Defendants had no reasonable ground to believe and did not believe, at the time the Registration Statement became effective, that any of those statements or reports were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make those statements and reports not misleading.

Seventh Defense

39. As regards those parts of the Prospectus not purporting to be made on the authority of Defendant Coopers & Lybrand as experts on accounting matters, these Defendants had, after reasonable investigation, reasonable ground to believe and did believe, at the time the Registration Statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

Eighth Defense

40. These Defendants at all times mentioned in the Plaintiffs' First Amended Complaint acted in good faith and did not directly or indirectly induce any violation of the Securities Exchange Act of 1934 or any of the regulations promulgated thereunder, and no such violations occurred.

Wherefore, having fully answered the Plaintiffs' First Amended Complaint, Defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas pray that Plaintiffs take nothing on their First Amended Complaint, that this action be dismissed on the merits, and that these Defendants recover their costs herein, including reasonable attorneys' fees.

PEPER, MARTIN, JENSEN, MAICHEL and HETLAGE
By WILLIAM A. RICHTER
Attorneys for Defendants, Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ANSWER
Of Defendant Punta Gorda Isles, Inc., to Plaintiffs' First Amended Complaint

(Filed October 9, 1973)

Comes now the Defendant Punta Gorda Isles, Inc., and for its answer to Plaintiffs' First Amended Complaint states as follows:

COUNT I

1. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiffs' First Amended Complaint.

2. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' First Amended Complaint.

3. The Defendant admits that portions of the Defendant's Prospectus dated May 2, 1972 ("Prospectus"), were prepared in the Eastern District of Missouri, that some of the Prospectuses were distributed in the Eastern District of Missouri, that some of the securities offered by the Prospectuses were sold in the Eastern District of Missouri, and that the Defendant aided and participated in the preparation of those Prospectuses; the Defendant denies all other allegations contained in Paragraph 3 of the Plaintiffs' First Amended Complaint.

4. The Defendant admits that the means and instrumentalities of interstate commerce and the mails were used in connection with the public offering of its securities in May 1972; the Defendant denies all other allegations contained in Paragraph 4 of the Plaintiffs' First Amended Complaint.

5. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of Plaintiffs' First Amended Complaint.

6. The Defendant does not know what is meant by "typical" in Paragraph 6 of Plaintiffs' First Amended Complaint, and therefore is without knowledge or information sufficient to form a belief as to the truth of the allegation that "In a typical transaction, the customer pays 5-10% down on the purchase price of a homesite, and then pays the balance in installments over a ten year period"; the Defendant admits the other allegations contained in Paragraph 6 of the Plaintiffs' First Amended Complaint.

7. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 7 of Plaintiffs' First Amended Complaint.

8. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 8 of Plaintiffs' First Amended Complaint.

9. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 9 of Plaintiffs' First Amended Complaint.

10. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The De-

fendant admits the other allegations contained in Paragraph 10 of Plaintiffs' First Amended Complaint.

11. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 11 of Plaintiffs' First Amended Complaint.

12. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 12 of Plaintiffs' First Amended Complaint.

13. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 13 of Plaintiffs' First Amended Complaint.

14. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 14 of Plaintiffs' First Amended Complaint.

15. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 15 of Plaintiffs' First Amended Complaint.

16. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 16 of Plaintiffs' First Amended Complaint.

17. The Defendant admits that pursuant to a Registration Statement which was declared effective by the Securities and Exchange Commission ("SEC") on May 2, 1972, $15,000,000 in principal amount of its Debentures and 171,570 shares of its Common Stock at a price of $18 per share were offered to the

public. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 17 of Plaintiffs' First Amended Complaint.

18. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of Plaintiffs' First Amended Complaint.

19. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of Plaintiffs' First Amended Complaint.

20. The Defendant is without knowedge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of Plaintiffs' First Amended Complaint.

21. The Defendant denies all the allegations contained in Paragraph 21 of Plaintiffs' First Amended Complaint.

22. The Defendant denies all the allegations contained in Paragraph 22 of Plaintiffs' First Amended Complaint.

23. The Defendant admits that the Registration Statement became effective with the SEC on or about May 2, 1972, and the Defendant denies all other allegations contained in Paragraph 23 of Plaintiffs' First Amended Complaint.

24. The Defendant denies all the allegations contained in Paragraph 24 of Plaintiffs' First Amended Complaint.

25. The Defendant denies all the allegations contained in Paragraph 25 of Plaintiffs' First Amended Complaint.

26. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of Plaintiffs' First Amended Complaint that the Plaintiffs purchased and sold the Defendant's Debentures and Common Stock. The Defendant admits that $15,000,000

in principal amount of its Debentures and 171,570 shares of its Common Stock were offered to the public in the offering of May 2, 1972. The Defendant denies all other allegations contained in Paragraph 26 of Plaintiffs' First Amended Complaint.

27. The Defendant denies all the allegations contained in Paragraph 27 of Plaintiffs' First Amended Complaint.

COUNT II

28. For its answer to Paragraph 28, the Defendant incorporates herein by reference the responses contained in Paragraphs 1-27 of this Answer as fully as though said responses were set forth in full herein.

29. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiffs' First Amended Complaint.

30. The Defendant denies the allegations contained in Paragraph 30 of Plaintiffs' First Amended Complaint.

31. The Defendant denes the allegations contained in Paragraph 31 of Plaintiffs' First Amended Complaint.

32. The Defendant denies the allegations contained in Paragraph 32 of Plaintiffs' First Amended Complaint.

Further answering, the Defendant alleges as follows:

First Defense

33. A copy of the Prospectus dated May 2, 1972, is attached to this Answer as Exhibit "A" and by reference is fully incorporated herein. A copy of the Defendant's 1972 Annual Report is attached to this Answer as Exhibit "B" and by reference is fully incorporated herein. The changes in the Defendant's ac-

counting procedures are described on Pages 3, 18 and 19 of the 1972 Annual Report. For the reasons there stated, the differences between the income reported in the Prospectus and the income reported in the 1972 Annual Report result solely from a difference in the method of reporting and do not reflect any inaccuracy in the income figures in the Prospectus. The Prospectus contains no misstatements of material facts nor does it fail to state any facts necessary to make the statements contained therein, in the light of the circumstances under which they were made, not misleading.

Second Defense

34. The Defendant did not know, and in the exercise of reasonable care could not have known, of any untrue statements of material facts, or of any omissions to state material facts necessary to make the statements, in the light of the circumstances under which they were made, not misleading.

Third Defense

35. The Plaintiffs did not purchase any securities from the Defendant.

Fourth Defense

36. The damages, if any, suffered by the Plaintiffs represent other than the depreciation in value of their securities resulting from those parts of the Registration Statement, with respect to which they assert the liability of Defendant, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

Fifth Defense

37. The damages, if any, suffered by the Plaintiffs were not caused by any misstatements of material facts in the Registra-

tion Statement nor by any failure to state any material facts required to be stated therein or necessary to make the statements therein not misleading.

Wherefore, having fully answered the Plaintiffs' First Amended Complaint, Defendant Punta Gorda Isles, Inc., prays that Plaintiffs take nothing on their First Amended Complaint, that this action be dismissed on the merits, and that this Defendant recover its costs herein, including reasonable attorneys' fees.

PEPER, MARTIN, JENSEN, MAICHEL and HETLAGE
By WILLIAM A. RICHTER
Attorneys for Defendant Punta Gorda Isles, Inc.
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(Certificate of service omitted in printing)

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[2] IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEPOSITION OF CECIL LIVESAY
Taken on the 19th day of April, A.D., 1974

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[3] **Direct Examination**

By Mr. Richter:

Q. Would you state your name, please? A. Cecil Livesay.

Q. And where do you live, Mr. Livesay? A. 955 Glen Way. In Glendale, Missouri.

Q. And what is your occupation? A. Police Chief.

Q. And in what City? A. The City of Glendale.

Q. And are you the Cecil Livesay who is one of the Plaintiffs in the case of Cecil and Dorothy Livesay versus Punta Gorda Isles, Etc., et al? A. I am.

Q. How long have you been the Chief of Police in Glendale? A. I am in my fifth year being Chief.

Q. How long have you been on the Glendale Police Force? A. Eighteen years.

Q. How old a man are you? **[4]** I am forty.

Q. How long have you been in police work? A. Eighteen years.

Q. And you started with Glendale? A. I did.

Q. The Glendale Police Department? A. I did.

Q. Had you had any employment prior to being a policeman? A. Yes, sir.

Q. And what was your prior employment? A. I was working at Brown Shoe Company.

Q. What is your highest degree of formal education? A. One semester of college.

Q. And you have had courses, I take it, in police work? A. I have.

Q. Chief, I am going to ask you questions during the course of this deposition, and I would assume from your work as a police officer you had occasion to testify in Court from time to time and you are familiar how these examinations go, generally? A. It's all been criminal, but, yes, sir.

Q. If at any time I ask you something that you don't understand or you need clarification, just say so and we will proceed from that. A. Thank you.

[5] Q. I might say because of the nature of this suit that we are going to get into some personal information which is because of the type of case that you brought here, and we are not meaning to pry, but it is information we are entitled to inquire into. A. I understand.

Q. And first of all then, let's start out with asking you what your annual income is as Chief of Police? A. Fourteen five, fifteen thousand, something around there. Between fourteen and fifteen.

Q. And what was your income, approximately, in 1972? A. Between twenty-three and—in '72? Twenty-one, twenty-one thousand.

Q. Do you have another source of income other than your pay as Chief of Police? A. And my wife's salary.

Q. Okay. That twenty odd some thousand you gave me for '72 was a combined income of you and your wife; is that correct? A. Yes, sir, that's correct.

Q. And what was your income in '72? A. Thirteen thousand.

Q. And what is your wife's current income? A. Her current income, ninety-five hundred, nine thousand.

Q. And the figures that you have given me for your income **[6]** and your wife's, are those your gross before your various deductions? A. Yes, sir, it is.

Q. What training courses have you gone through as a police officer in the last five years, let's say? A. Well, I had a management course, short seminars, and I think I went to the Major Case Squad Training, and that would be in the last five years, that would be it.

Q. What high school did you graduate from? A. Beaumont.

Q. What university did you attend for a semester? A. Washington U.

Q. Here in St. Louis? A. Yes, sir.

Q. In your complaint you alleged that in May of 1972, you purchased some securities of Punta Gorda Isles, Inc. Had you purchased any corporate securities at any time prior to purchasing the securities of Punta Gorda Isles, Inc., as alleged in your complaint? A. Yes, sir, I have.

Q. When was the first time, to the best of your recollection, that you purchased any corporate securities? A. 1961.

Q. And what fixes that date in your mind? A. I just remember when I got—when I became interested in securities was 1961. And I attended an investment **[7]** seminar, and it was '61.

Q. Who conducted that seminar? A. The first one I attended was a one-day seminar given by the Globe-Democrat.

Q. And did you shortly thereafter purchase corporate securities? A. I did.

Q. And have you continued to buy and sell securities since 1961? A. Yes, sir.

Q. Have you kept any records over the years of the securities which you have bought and sold? A. If I would go back on my income taxes, I am sure I would have it. I don't know how long I retain them, but, yes, I would probably have a record of everything.

Q. Do you have any independent recollection of approximately how many securities you purchased since 1961? A. This would be a guess, but since 1961, I would say between seventy-five and one hundred.

Q. And do you have any approximation of how many of those you sold, how many securities you have sold since that time? A. I probably sold all of them but six or eight of them.

Q. In 1972, what was the approximate amount you had in investments in corporate securities? **[8]** A. $30,000.00.

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[12] Q. I believe you testified that you owned how many stocks currently? A. Eight.

Q. And what is the stock value currently of your investment portfolio? **[13]** A. $40,000.00.

Q. And I said stock. Do you own any other corporate securities other than stocks? A. Debentures.

Q. Do you include that in the forty thousand? A. I do.

Q. Do you have any idea what the approximate value of your bonds or debentures are as compared to your stocks? A. Ten thousand in debentures.

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[69] Q. Do you have any written agreement with Mr. Green concerning his representation of you in this case? **[70]** A. Written agreements, no, sir.

Q. Do you have any written agreement pertaining to his fees in connection with this case? A. No, sir.

Q. Do you have any oral agreement with Mr. Green concerning his representation of you in this case? A. An oral agreement?

Q. Right. A. Yes.

Q. Do you have any oral agreement with him concerning payment of fees and expenses in connection with this case? A. Yes, sir, I do.

Q. Now has Mr. Green given you any writing, not in the form of an agreement, but such as a letter signed by him relating to his representation or fees in this case? A. His fees?

Q. Yes. Or his expenses. A. No.

Q. Have you given him anything in writing concerning those subjects? A. No.

Mr. Green: Off the record.

[Whereupon there was an off the record discussion.]

Mr. Richter: For the record: You are allowing your client to answer questions with respect to your arrangements in fees and arrangements on representation, and it will not **[71]** constitute a waiver on any attorney-client privilege that you might have. Now John, is that agreeable with you?

Mr. Hennelly: Of course.

Q. (Mr. Richter) Chief, you said that you had an oral agreement with Mr. Green concerning his representation of you in this case and concerning payment of fees and expenses in this case, am I correctly stating what you testified to previously? A. You are.

Q. Now first of all: Let me ask you what the agreement is with respect to representation. Is there anything beyond the fact that he would represent you in this case and that you would bring these suits as the appointed representatives of a class? A. Of a——

Q. Let me ask you what your understanding is, your agreement with Mr. Green concerning his representation of you and your wife in this case. In other words, the question of fees and expenses at this point. A. All right. That he would represent me and the other class holders, and that he explained that it would be a class action suit, and that he would represent me and the other class holders.

Q. And do you have any other agreement concerning his representation? **[72]** A. No.

Q. And do you have any agreement concerning his representation of you and your wife as individuals in the event for some reason this should not be a class action? A. No.

Q. Now what is your agreement with him concerning payment of fees? A. Well, the fee—he said that he could not determine that, that I would have to pay the court costs, and that there would be some expenses involved, and again he said that he could not determine what the expenses would be, but he would have to take some trips, and it could be rather expensive.

Q. Do you have any agreement with him as to the maximum amount of expenses you will pay in this case? A. No.

Q. Have you agreed with him to pay the expenses regardless of what they might be? A. I have.

Q. And you have lost, if I have your figures correctly, approximately $2,443.29 on this transaction, do these figures sound substantially right? A. Yes.

Q. And did Mr. Green in his discussions with you explain that your expenses of this case could be substantially in excess of that amount? **[73]** A. Yes, sir. And he further stated that the court could award me these expenses back.

Q. Have you agreed with him to pay the expenses incurred in prosecuting this action even if it is not a class action? Have you made any agreement as to what would happen if it is not a class action? A. No, none.

Q. Have you made any agreement with him concerning the payment of a fee to him? A. No. He said he could not determine how many hours would be spent and what all would be involved. There hasn't been an agreement on what the fee would be.

Q. Have you agreed to pay him a fee at all? A. I said I would pay him his fee.

Q. Have you agreed to pay him a fee regardless of the outcome of the lawsuit? A. Yes, I have.

Q. Have you agreed to any basis on which you would pay him a fee? A. Is that the end of the question?

Q. Yes. A. I'm sorry, would you repeat it?

Q. Have you agreed to any basis for the fee? A. No.

Q. You have no agreement on whether the fee is to be based **[74]** on the amount of time he spends? A. Oh, he said that he wouldn't be able to tell me the exact fee.

Q. Did you agree on a rate you would pay him for his time? A. No.

Q. Did you agree that he would be paid on the basis of a percent of any recovery of this? A. No.

Q. You just agreed to pay him a fee? A. Yes.

Q. Is it your understanding you would pay him whatever he would charge you? A. Well, if he—I might argue about it if it was too high. Something unreasonable, but I said I would pay his fee to represent me.

Q. And you also have agreed to pay the expenses whatever they might be? A. I have.

Q. What if the expenses were say $25,000.00, what is your understanding? Would you be obligated to pay him? A. If the court would not, we agreed to pay him.

Q. If it were $10,000.00, you would pay him that? A. Yes.

Q. And in addition you agreed to pay him a fee? A. I have.

[75] Q. Have you made any agreement with him for the payment of a fee if this was not a class action? A. No.

Q. Your agreement has nothing to do with whether or not this is a class action; is that correct? A. No.

Q. You just agreed to pay him whatever he charges you; is that right, for a fee? A. Well, when I retained him he explained what might be involved. And I said I would be willing to pay the expenses and his fee plus court costs.

Q. And you made that agreement regardless of the outcome of the case? A. I did.

Q. And is it your understanding that you will be obligated to pay Mr. Green a fee if you lose this case? A. Yes, it is my understanding.

Q. And whatever fee he might charge is what you would be obligated to pay? A. Yes, it would be my obligation.

Q. But he has not agreed to charge any particular amount; is that correct? A. No, he has not.

Q. Has he told you that he won't charge you any fee if you didn't recover anything? **[76]** A. No, he didn't tell me that.

Q. Did he say that you would not have to pay a fee if the fee was not recovered from the Defendants? A. No, he didn't tell me that.

Q. Have you advanced any expenses to this point in the litigation? A. No.

Q. Have you paid for filing fees of this case? A. No.

Q. Have you received any bills for any costs? A. No, I haven't.

Q. Would you pay a bill for $18,000.00 for expenses if Mr. Green presented you with one after this case was over and you did not recover anything? A. Well, I would have to see that it was a truthful bill, but, yes, I would have to pay it. My arrangement was to pay the expenses, his fee and the court costs.

Q. Has Mr. Green told you that you would receive anything out of this case other than a maximum of some twenty-four hundred dollars, which you claim to have lost on the stock? A. Well, it's twenty-six hundred.

Q. Excuse me. A. And it is—well, twenty-five, whatever it is.

[77] Q. Approximately twenty-five hundred dollars. Can we use that for talking? A. Yes, sir. He said that I could recover

my loss and that the court could award me the expenses involved in pursuing the case.

Q. But, of course, that would be money that would go to reimbursing Mr. Green for expenses incurred in pursuing the case, was that your understanding? A. Right.

Q. So you couldn't stand to gain any more in a round number of twenty-five hundred dollars, which you lost, plus perhaps interest. A. That's true.

Q. Is that what he told you? A. That's what he told me.

Q. And you agreed, with that understanding, to pay him whatever the expenses are in prosecuting the action regardless of the outcome? A. I have.

Q. And you also agreed to pay him whatever he might charge you regardless of the outcome of the action? A. I have.

Q. However you said that if you felt that his fee was too high, you would argue with him about that; is that correct? **[78]** A. Well, you know, when you mention $25,000.00, I would want——

Mr. Green: He is talking about expenses on twenty-five thousand.

Q. (By Mr. Richter) Well, would you argue with him about the fee if you felt the fee was too high? A. No, I am sure Mr. Green would be fair in the fee he presents me, and the expenses.

Q. As I understand your agreement, you would pay him expenses no matter what they were? A. That's true.

Q. But if he presented you a bill for $25,000.00 for a fee, would you argue with him about that? A. Would I be happy with him?

Q. Would you argue with him about it?

Mr. Green: Let me object. I think you are asking questions that are becoming speculative in nature. I don't see how he can give a knowledgeable answer to something that may or may not occur.

Q. (By Mr. Richter) If I understand your testimony, you have not agreed to any maximum or minimum fee with Mr. Green? A. You understand exactly.

Q. You have not agreed to any basis on which his fee would be computed? **[79]** A. We have not.

Q. You have agreed to pay all of the expenses no matter what they are and regardless of the outcome of the suit? A. I have.

Q. And you also agreed to pay him whatever fees he might charge? A. I have.

Q. Did Mr. Green, in reaching this agreement, tell you that he expected you would not have to pay him any fee out of your own money? A. The fee out of my own money?

Q. Right. Did he tell you he expected to recover a fee out of any amount he might recover in this case from the Defendants? A. Now I don't understand the question.

Q. Did Mr.Green tell you that he did not expect you to pay him any amount for his fee out of your own money? A. No, he didn't tell me.

Q. Did he tell you in reaching any agreements that he expected that his fee would be paid out of the amounts recovered from the Defendants? A. No, he didn't tell me that.

Q. Did he tell you in reaching this agreement that he expected that any expenses he incurred would be paid out of **[80]** the amounts recovered from the Defendants? A. No, he didn't tell me that.

Q. Did he tell you that he did not anticipate that you would ever have to pay him any expenses? A. No, he didn't tell me that.

Q. Did you have any agreement as to when you will pay him expenses which he has incurred in the prosecution of this case? A. When the case comes to a conclusion.

Q. And your agreement is that you do not have to pay him any expenses until the case is over? A. Unless he sent me a bill before then, but that was——

Q. But your understanding is that you will not have to pay anything until the case is over? A. The conclusion, until he determines what his expense and what his fee will be.

Q. Does your agreement on representation include an agreement on how far Mr. Green will handle the case for you under the agreement which you testified to? A. How far?

Q. Right. For example, to help you: Does this include the trial, does this include an appeal, and how high an appeal? A. Until the case reaches a conclusion, to take it to a conclusion.

[81] Q. Do you have any agreement with respect to his representation in the event that there should be an appeal of the case by either party to an apparent complete course? A. Do w[illegible]e an agreement?

[illegible]ight. A. I said that I would pay his expenses, his fees, and the cour[illegible]sts to the conclusion of the case.

Q. But you haven't—your agreement doesn't specify what the conclusion consists of? A. We haven't talked about an appeal.

Q. And your agreement did not involve specifically the question of whether an appeal would be included? A. No, we have—I am sure—about an appeal, I don't know, no.

* * * * * * *

[91] Q. If the class cannot recover, are you asking the court to give you your loss in this case? A. No.

Q. You don't want to recover in this case if you can't recover for the whole class; is that your testimony?

Mr. Green: Let me object if only to distinguish between whether you are talking about an issue of liability or an issue of class action status. Obviously if the liability isn't there, nobody recovers, and if there is no class action there can still be liability on the part of the individual.

Q. (By Mr. Richter) That's a good clarification. Chief, do you understand that this case basically has two **[92]** claims. That there is one claim on behalf of you and your wife to recover what you lost, and another claim that you are representing a class for everything that supposedly the class lost, and it may happen that you cannot maintain this as a class and all that would be left would be your own complaint. Have you understood that? A. Yes.

Q. And are you seeking recovery on behalf of yourself and your wife in this case even if the class can't recover? A. No.

Q. You don't want to recover in this suit if the class can't recover; is that correct? A. Well, I know this is a class action suit.

Q. What if it is not a class action suit, are you still making a claim for your own loss just for you and your wife in that case? A. No.

Q. If it is not a good class action suit, you don't want to recover in this case; is that correct? A. I don't want to recover?

Q. Well, that's what you just testified to. I don't think that's accurate, and that is why I am trying to help you and ask you if you are making a claim for your own twenty-five hundred dollar loss in this case separate from the class action if it's not a good class action. **[93]** A. I guess I don't understand, because

I thought a class action was for all of the shareholders, and if you win, all of the shareholders could share in it.

Q. That's not necessarily true. You want to get your twenty-five hundred dollars back even if the other people can't get their loss back?

Mr. Green: I am going to object for the record. I think he already answered the question. Bill, and we don't appreciate the assistance that you claim you are giving him. I think he answered that question.

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[2] CONTINUED DEPOSITION OF CECIL LIVESAY
taken on the 30th day of April, A.D. 1974

[3] **Cross-Examination**

By Mr. Hennelly:

* * * * * * *

[83] Q. (By Mr. Hennelly) If Judge Wangelin decides that this suit should not be a class action, what is your arrangement with him to cover his fees then? A. That it should not be a——

Q. A class action. A. A class action? We haven't discussed that.

Q. Aside from Mr. Green's fees, what is your agreement with him with respect to court costs and expenses of discovery? A. That I would have to bear those, the expenses and the court costs.

Q. What about the cost of notifying all of the members of the class? A. That would be my responsibility.

Q. What about the cost of retaining experts to testify in support of the class action? A. That would be in the expenses.

Q. Is there any understanding as to a maximum amount which you would have to pay to cover these costs? A. No.

Q. Is the agreement in writing? A. No.

[84] Q. Has your agreement with Mr. Green changed at all since the last time we met here? A. No.

* * * * * * *

[98] Q. Why did you bring a class action on behalf of a whole group of people instead of just suing on your own behalf, Mr. Livesay? A. Well, it was a public offering, and it was not only—I was not the only shareholder. And if I was misled or something was wrong with it for me, it would be for everyone.

[99] Q. Well, do you understand that you could have sued on your own? A. That I could have sued on my own?

Mr. Green: Let me object to it. It's irrelevant as to anything that he could do or he could not have done, but you can answer the question whether you knew if you could have sued on your own or not.

A. No, I would think it would have to be a class action suit.

Q. (By Mr. Hennelly) Why do you think it would have to be a class action suit? A. Well, because there were a number of other shareholders. Everyone who purchased this read the same prospectus and got it at the same price with probably the same information.

Q. Do you don't think you could have gone into court by yourself and sued? A. No.

Q. Could you tell me in your own words who you think is in your class that you represent in this lawsuit? A. All the other individuals that purchased the stocks and the debentures that particular date to public offering.

Q. All right. Did you have any discussions with your attorney as to anybody else to include in the class? A. Who to include in the class? It was his investigations as to who he thinks should be joined in the class.

[100] Q. Did you make any recommendations with respect to the size or the composition of the class? A. No.

Mr. Green: Let me object and ask that the answer be stricken. I don't think that question is capable of a knowledgeable answer. How does one recommend the size of a class. That's a matter of fact and a matter for a court to determine judicially and not for a named Plaintiff to determine how many he would like to have in the class that he represents, so I object for that reason.

Q. (By Mr. Hennelly) How did you arrive at the decision to sue the company and some of its officers and the accountants but not A. G. Edwards, the underwriter? A. How did I?

Q. Yes. A. Well, I wasn't the one that arrived at it. I presented my attorney with what little information I had and what information I could secure and requested him to conduct an investigation and sue those that he thought was responsible.

Q. Did he discuss with you any particular reason for not filing suit against A. G. Edwards?

Mr. Green: Let me object. I think you are encroaching on our attorney-client privilege. If you are only asking if there was a discussion with the general subject matter of something, I don't mind if he answers it. But if you are **[101]** asking him what was said between us with respect to it, I will have to instruct him not to answer the question.

Q. (By Mr. Hennelly) Did your attorney indicate to you why he wasn't filing suit against A. G. Edwards?

Mr. Green: I will instruct you not to answer that question on the grounds that it tends to invade the attorney-client privilege. We are not waiving that privilege.

Q. (By Mr. Hennelly) Did you ask your attorney at any time why A. G. Edwards was not named as a Defendant in this lawsuit?

Mr. Green: That's the same question rephrased and so I will instruct you in the same way not to answer the question.

Q. (By Mr. Hennelly) Are you at all puzzled by the fact that A. G. Edwards is not one of the named defendants in this lawsuit? A. Am I?

Q. Puzzled? A. No.

Q. That doesn't bother you at all? A. No.

Q. Have you had any conversations with Mr. Green with respect to retaining experts to testify in your behalf in this lawsuit?

Mr. Green: That's kind of a borderline question, John, and while you are not specifically asking what we said, **[102]** the question, since you put in a lot of facts at the very beginning of the question, is a loaded question and borders on our privileged communications. And if you think about it, you might agree.

Mr. Hennelly: I asked whether he had any discussions.

Mr. Green: But you didn't just ask that. You asked if there were any discussions with respect to the possible employment of expert witnesses, and so it does border on the nature of the discussion between us. But I can tell you the answer is no, if that is helpful.

Q. (By Mr. Hennelly) If the Judge were to decide that this case wasn't proper for a class action, would you proceed with it on your own? A. If he decided that it was not proper for a class action, would I proceed on my own?

Mr. Green: Let me object to the question because I think it's speculative. I don't think he should be put in a position where he has to give an answer to a question today on something that, number one, may never come about, and number two, if it does, it might not be for many months from now. And third, a decision that he really wouldn't make until he

conferred with his lawyer and the thing is discussed from beginning to end, if it ever gets to that point, so I wouldn't—I will let him answer the question, but I don't want you to feel that is bound by the answer that he gives today as to what **[103]** his feelings might be six months from now, an unlikely eventuality.

Q. (By Mr. Hennelly) If you can remember the question. A. I guess—I couldn't give a yes or no. I would have to consult Mr. Green and ask him his advice on this on your question.. And if he said yes, then I would proceed, yes.

Q. How much do you have presently in the stock market, in stocks and bonds? A. Forty thousand.

Q. Would that include your municipal bonds and—— A. Yes.

Q. How about in savings accounts? A. $5,000.00

Q. Do you own any other real estate besides your home? A. Not at this time.

Q. Certificate of deposits? A. No, no certificates, no.

Q. What is the market value of your home? A. Forty thousand. Between forty and fifty.

Q. How much equity do you have in it? A. All about eleven or twelve thousand dollars paid.

Q. You've got about—— A. Thirty.

Q. Thirty in equity? A. Uhuh.

[104] Q. Do you have any other major debts besides the outstanding mortgage on your home? A. I don't have any at all.

Q. Would you say your net worth then is somewhere in the range of $75,000.00?

Mr. Green: That's jointly with his wife?

Q. (By Mr. Hennelly) I am assuming that all of this is jointly with his wife already. He already testified that she didn't own anything independently. A. Seventy-five and one hundred thousand.

Q. How much of that would you be willing to commit to the prosecution of this lawsuit? A. As much as necessary.

Q. If it's necessary to commit $50,000.00, would you commit $50,000.00 to it?

Mr. Green: Let me object to something that is really so far out of line, John, that it borders on being really an unfair question. You know, if you ask him if he is willing to commit five thousand or something like that, when it comes down to the realm of what the cost really might be in this case, but when you are talking about $50,000.00, it's such a gross exaggeration, and so unrealistic, it really isn't a fair question, and I don't think he can give you a knowledgeable answer to that one. And furthermore, Bill Richter covered this ground previously and it is **[105]** repetitious.

Mr. Hennelly: Well, are you telling me then that if the case were to be lost, he could not be charged anymore than say $5,000.00, you would waive all the time that you put into this?

Mr. Green: Without waiving our attorney-client privilege what I am saying is——

Mr. Hennelly: That goes directly to the fee agreement.

Mr. Green: As he testified, there is no specific dollar and cent amount described. I have advised him as to what I believe the cost might be. They could be four or five thousand dollars. And he told me, "Yes, that he will take care of that once an itemized statement is made", which I think he testified to, and the bills have been reasonable. We never discussed the possibility that there could be $50,000.00 in costs here, and the mailing costs for the notices was four or five hundred dollars.

Mr. Hennelly: What about your fees?

Mr. Green: Well, he testified that the court has discretion to award those fees and may or may not award them. And he is not responsible——

Mr. Hennelly: He is not responsible for the fees if the suit is not successful?

Mr. Green: That's right. He is not obligated to pay me any fees whether we win or lose this lawsuit. I mean, **[106]** I believe I am testifying on his behalf in a sense, and I don't mean to, but I am trying to curtail this a little bit.

Mr. Hennelly: Well, that's fine, I'm trying to get that.

Mr. Green: I know you have, and that is why I am giving you a rather lengthy statement as to our fee arrangement, because what I know you really want is facts here, and it doesn't really matter where they come from, but, really, that's the arrangement.

Mr. Hennelly: I don't have any further questions. I thank you very much for your time, Mr. Livesay.

Redirect Examination

By Mr. Mills:

Q. Mr. Livesay, have you discussed with your counsel the possibility that you may have to pay our attorney's fees in the event that you are unsuccessful in this lawsuit? A. Pay your attorney fees?

Q. Yes. A. The court costs?

Mr. Green: He wants a yes or no answer.

A. No.

Q. (By Mr. Mills) So at this point in time, you are not aware of the possibility that you may be required to pay our attorney fees? A. No.

[107] Q. Or Mr. Hennelly's attorney's fees? A. No.

Mr. Green: He hasn't asked for them and it's impossible anyway to support a class action by the Defendants.

Q. (By Mr. Mills) Have you discussed with your attorney the possibility that you may be required to pay our other expenses, the expenses with the Defendants, in addition to their attorney's fees? A. No.

Q. Independent of any discussions with your attorney, do you have any awareness of any possibility such as that? A. Your expenses? No.

Q. If you were advised of that possibility, would it affect your determination to proceed with this class action? A. No, not now, it couldn't now, no.

Q. So that even if you recognize a possibility that you might have to pay our attorney's fees and our expenses, the attorney's fees and expenses of the other Defendants, you would still proceed with the class action? A. Definitely.

Q. Without any concept of what the dollar amount might be involved? A. I would have to know—yes, I would have to proceed with it now.

* * * * * * *

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[2] IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEPOSITION OF DOROTHY LIVESAY taken on the 19th day of April, A.D. 1974.

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[3] **Direct Examination**

By Mr. Richter:

Q. Would you state your full name, please? A. Dorothy Livesay.

Q. Where do you live, Mrs. Livesay? A. In Glendale.

Q. And what is your address? A. 955 Glen Way.

Q. How long have you lived there? A. Nine years, approximately.

Q. Are you currently employed? A. Yes, I am.

Q. And what is your occupation? A. Office manager.

Q. With whom? A. Woodard Rug & Drapery Cleaners.

Q. Where are they located? A. In Rock Hill.

[4] Q. How long have you been employed there? A. Eleven years.

Q. Mrs. Livesay, I represent all of the Defendants except Coopers and Lybrand in the case wthich you have brought against Punta Gorda Isles, Etc., et al. And I am going to ask you some questions here. If you don't understand my questions or if you don't understand a word I use, or if you have any question at all, you let me know and then we will proceed. You are the Dorothy Livesay who is the Plaintiff in this

suit, Cecil Livesay and Dorothy Livesay versus Punta Gorda Isles, Incorporated, Etc., and other Defendants, are you not? A. Yes, I am.

Q. Mrs. Livesay, what is your highest level of formal education? A. High school.

Q. And you are a high school graduate? A. Yes, I am.

Q. And from what high school did you graduate? A. Soldan Blewett.

Q. And Cecil Livesay, the other plaintiff in this action, is your husband; is that correct? A. That's right.

Q. How long have you been married to him? A. Twenty-one years.

[5] Q. And as I understand he is a police officer? A. That's correct.

Q. Do you have any children? A. Yes, we do.

Q. How old are they? A. Eighteen and three.

Mr. Righter: Off the record.

[Whereupon there was an off the record discussion.]

Q. (By Mr. Richter) Prior to the time you purchased the debentures in stock of Punta Gorda Isles, Incorporated, as alleged in your complaint, had you ever purchased any other corporate securities? A. Yes, sir.

Q. When was the first time that you can recall of ever purchasing any corporate securities? A. I really don't remember, recall.

Q. Approximately how many years ago was it? A. It would be strictly a guess. My husband handled it, and I really don't—it would have to be strictly a guess.

Q. Have you ever yourself had any direct dealings with a broker? A. No.

Q. Do you know whether your husband purchases securities in joint names with yourself and himself as a matter of course? A. I don't understand what you mean.

Q. Are both of your names on the stock? **[6]** A. Yes.

Q. You had nothing to do with the purchasing of the securities; is that correct? A. That's correct.

Q. And you had nothing to do with the sale of securities? A. No, I hadn't.

Q. Do you have any knowledge of the approximate value of all of the securities owned by you and your husband in May of 1972? A. No, I don't.

Q. Do you know whether it would be more than $10,000.00? A. I doubt it.

Q. But you don't have any personal knowledge of the value at that time? A. No, no.

* * * * * * *

[21] **Cross-Examination**

By Mr. Hennelly:

Q. Mrs. Livesay, I represent Coopers and Lybrand Accounting. What are your children's names? A. Melissa and Linda.

Q. And which child is eighteen, and which—— A. Linda is eighteen.

Q. Linda is eighteen? A. And Melissa is three.

Q. Are they both in good health? A. Yes, they are.

Q. Your husband is in good health, I take it? A. Yes.

Q. And Melissa was eighteen—— A. No, Melissa is three and Linda is eighteen.

Q. Is she going to college next year? A. Yes, she is.

Q. Do you know where she is going to college? A. She is not sure.

Q. Does she have any school under consideration? A .Yes, Cape Girardeau.

Q. Cape? A. Uhuh.

Q. Do you have any knowledge offhand how much it costs **[22]** to—— A. Yes.

Q. ——to attend college at Cape? A. Yes.

Q. About how much would that be? A. About twelve hundred a year.

Q. Do you expect to pay for that? A. Yes, we partly, and she also will pay part.

Q. About what portion would you be paying and what portion would she be paying for? A. I would assume probably sixty-forty.

Q. How much do you earn a year at Woodward Rug & Drapery Cleaners? A. Between eight and nine thousand.

Q. Between eight and nine thousand? A. Yes.

Q. Do you have any bank accounts which are separate from your husband's? A. No, I do not.

Q. Do you own any property which is separate—— A. No.

Q. ——separate from your husband? A. No.

Q. No securities? A. No.

Q. Any other real estate? **[23]** A. No.

Q. Any other things of value, jewelry or antiques, which would be of sufficient value that you owned independent from your husband? A. No.

* * * * * * *

[27] Q. How much do you have in the bank? A. I don't know.

Q. Do you presently own any other securities? A. I believe so.

Q. Could you tell me what those are? A. No, I couldn't.

Q. Do you own any other real estate with your husband besides your house? A. No.

Q. How much of your own money would you be willing to expend in prosecuting this lawsuit? A. Whatever it took.

Q. If it took three or four or five thousand dollars, would you be willing to spend that? A. Uhuh.

Q. Even though you told us you only lost twenty-seven hundred dollars? A. Yes.

Q. And there was a possibility that you would not be reimbursed at all? A. Yes.

* * * * * * *

[29] **Redirect Examination**

By Mr. Richter:

* * * * * * *

Q. Mrs. Livesay, I want you to listen to this question very carefully and only answer the question that I ask. Do you have any signed fee agreement with Mr. Green? A. No.

[30] Q. Have you made any oral agreement with Mr. Green concerning his fee? A. No.

Q. Did your husband, prior to the time he sold the Punta Gorda securities, tell you why he was going to sell them? A. Yes.

Q. And what reason did he give you?

Mr. Green: I think at that point you are now touching on privileged matters, and I will instruct the witness not to answer the question. Off the record.

[Whereupon there was an off the record discussion.]

Q. (By Mr. Richter) Did your husband say anything to you about the prospectus being incorrect before he sold the stock?

Mr. Green: Same objection and the same instructions to Mrs. Livesay. In other words, that she is not to answer it because it constitutes privileged information.

Q. (By Mr. Richter) Mrs. Livesay, when did you first obtain any information that the prospectus might be incorrect? A. He mentioned——

Mr. Green: Just a minute.

Q. (By Mr. Richter) I asked you when you first obtained this information? A. I don't recall.

Q. Do you recall whether it was before or after your **[31]** husband sold your Punta Gorda securities? A. Before.

Q. And would you state to me the names of all persons from whom you received any information that the prospectus was incorrect prior to the date that you sold the stock? A. That I received?

Q. Right. A. My husband.

Q. Now would you state to me the names of all persons from whom you received any information that the prospectus was incorrect after the date you sold the stock? A. Of my attorney, Martin Green, and my husband.

Q. What information were you given prior to the date that your husband sold the stock relating to the prospectus being incorrect?

Mr. Green: Wait. I'm going—the same instructions, not to answer, because her previous testimony indicates that the sources of this information is either her husband or her lawyer, and in either case it would be privileged, so——

Mr. Richter: She didn't get anything from her lawyer prior to the time the stock was sold, and that was the question. What

information she received about the prospectus being incorrect prior to the time the stock was sold.

Mr. Green: I stand corrected in that point, but she had testified that it all came from her husband, and so I think it is privileged, and you are not to answer the **[32]** question.

Q. (By Mr. Richter) Did you have any opinion prior to the time that you sold the stock on whether the prospectus was incorrect or misleading? A. Other than what he said.

Q. Did you have any opinion yourself? A. Well, yes, I thought he was right.

Q. In what respect did you believe the prospectus was misleading prior to the time that you sold the stock, your stock? A. Well, the dredging and the accounting.

Mr. Richter: That's all I have.

Recross-Examination

By Mr. Hennelly:

Q. How long prior to the time that you sold your stock did you formulate this opinion? A. I don't—I don't know.

Q. Was it the day before? A. I doubt it.

Q. A month?

Mr. Green: Let me object for two reasons. First of all, she said she doesn't know, and second of all, it's beginning to border on the conversations that she had with her husband. She already indicated that was her only source, so I will instruct her on this point not to answer it.

Mr. Hennelly: Wait a minute! I haven't asked about any **[33]** conversations. I asked her about her own personal opinion, and I am not badgering her. She said—I am trying to help her focus in on some kind of time, at least a framework of time.

Mr. Green: The opinion is based directly on conversations. Asking her opinion is the same thing as asking her about conversations at this point.

Mr. Hennelly: I am asking her about what point in time. I am not asking for any substance of opinion.

Mr. Green: I think she said she didn't know.

Mr. Hennelly: I am trying to help her focus it on it. If you want to register your objection to that and go on the record, that's fine, but that doesn't mean that she is waiving any privileges. I can inquire into dates.

Mr. Green: Well, as she said she doesn't know, so——

Q. (By Mr. Hennelly) You indicated that you may have formulated this opinion prior to the time that you sold the stock but probably not the day before. Could it have been as long as a month before? A. It could have been. I don't know.

Q. Could it have been as long as two months before? A. I don't know.

Q. Three months before? A. I don't know.

* * * * * * *

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION FOR ORDER TO DETERMINE THAT CLASS ACTION CAN BE MAINTAINED UNDER RULE 23

(Filed April 11, 1974)

Plaintiffs move that the Court enter its Order determining that the above entitled action may be maintained as a class action for the reason that all of the requirements pertaining to the maintenance of class actions under Rule 23 have been met.

ANDERSON, GREEN, FORTUS &
LANDER
By MARTIN M. GREEN
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862-6800

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM AND ORDER

(Filed May 14, 1974)

This matter is before the Court upon the motion of the defendant, Coopers & Lybrand, for a limited stay of discovery pursuant to Rule 26(c), Federal Rules of Civil Procedure.

Said defendant urges that all discovery in this action, except that relating to the class action determination, be stayed pending a ruling by the Court as to the existence of a class action. It would seem that such contention is a viable one considering its implications of judicial, time and pecuniary economy. Such a limitation on discovery is within the discretion of this Court; *Houndry Process Corp. v. Commonwealth Oil Ref. Co.*, 24 F.R.D. 58 (S.D.N.Y., 1959); *Bordonaro Bros. Theatres, Inc. v. Loew's Inc.*, 7 F.R.D. 481 (S.D.N.Y., 1947). Accordingly,

It Is Hereby Ordered that the motion for a stay of discovery, except that relating to the class action determination, be and is Granted and that such discovery shall be pursued with due deliberate speed.

/s/ H. KENNETH WANGELIN
United States District Judge

Dated this 13 day of May, 1974.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

[1] TRANSCRIPT OF ARGUMENT ON MOTIONS

Transcript of argument had in the above-styled matter before the Honorable H. Kenneth Wangelin, Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. 3 thereof.

June 24, 1974

Appearances:

Mr. Martin M. Green and Mr. James A. Eidelman for the Plaintiffs;

Messrs. Bryan, Cave, McPheeters & McRoberts, by Mr. Veryl L. Riddle and Mr. J. Roger Edgar for Defendant Coopers and Lybrand;

Messrs. Peper, Martin, Jensen, Maichel & Hetlage, by Mr. Lewis R. Mills for Defendants Punta Gorda Isles, Inc., et al.

The Court: All right, you may proceed, gentlemen.

Mr. Green: Thank you, Judge. Your Honor, in this **[2]** motion, which, of course, is the class action portion of the case previously filed by the plaintiffs, we feel that this is a garden variety situation for a class action determination. As Your Honor knows, this entire lawsuit is predicated upon what we believe to be false, misleading and untruthful statements disseminated to the purchasers of Punta Gorda stocks and bonds at

a public offering in May of 1972. The misleading statements, untruthful statements that we've alleged were all identical and uniform with respect to the entire class, which was eighteen hundred people who bought at the public offering, and they were all contained in the preliminary and the definitive prospectus, which, by law, must be delivered to be each member of the class at the time that they purchase these stocks or bonds. The prospectus which contains all of the misleading statements has been admitted into the pleadings by both of the defendants. There isn't any dispute about the fact that what we have alleged to be the prospectus is indeed the prospectus.

The fraud in this case was a very, very large one involving the sale of some $15,000,000 at face value of Punta Gorda on debentures by the company and the sale of several million dollars worth of the company's common stocks by its two principal owners. The plaintiffs in this case, the plaintiffs in this case, Cecil Livesay and his wife, sustained an over-all loss at the time that they sold their **[3]** stocks and bonds after buying them at the public offering of about $2,625. The over-all loss to the entire class is something like in excess of $8,000,000.

* * * * * * *

[5] The named plaintiffs testified in their depositions that they are willing to spend more money than their actual loss in order to properly and fairly and adequately represent **[6]** the class in this matter. They indicated a net worth of something around $40,000 and a deep conviction and desire to see that redress is provided for the members of the class who lost their money in this public offering, so with respect to adequacy, I at least don't see any serious hurdle to a class action determination.

* * * * * * *

[8] They have said they weren't denying A. G. Edwards in the case, that was the underwriter in this case. I'm not sure

what they're getting at. At this point it's true, I've not joined them, I've explained to them and I've put in the brief—we feel at this point we haven't done sufficient discovery to make that determination and we simply don't want to join everybody in sight with the shotgun type of lawsuit and we're only going to join those people that we feel we have a substantial case against and it may well be A. G. Edwards in the near future.

They claim that an evidentiary hearing is required in these cases, and that simply isn't so. The wealth of opinions in this case say that only in certain isolated situations is an evidentiary hearing required for a Court to determine that there is a class action.

* * * * * * *

[26] In our memorandum we cite cases for the proposition **[27]** that the burden of proof on the class action issues is on the plaintiff. Plaintiffs have cited no contrary cases and I think we can accept that as a given starting point.

The Court: How long, gentlemen, would a hearing as to whether or not—I'm not talking about argument on motions, I'm talking about a regular full dress hearing on whether or not this should be a class action. I'm talking about introduction of evidence. How long would that take me?

Mr. Mills: Maybe a day, maybe a half a day.

Mr. Green: I would say that sounds about right if the Court —if there's evidence to be adduced, I can do it.

The Court: Well, I don't know, a hearing—assuming there's a question in the Court's mind I think the hearing should be had, how long do you think it would take, Mr. Riddle?

Mr. Riddle: Your Honor, a hearing on that, I think if all of us would be prepared, could be concluded in a day and a half.

The Court: All right. Pardon me, go ahead, Mr. Mills.

Mr. Riddle: That's my estimate on it. Is that consistent with yours?

Mr. Green: I think it will depend on what issues, if any, the Court thinks will require evidence. If there's one or two or three, I'd say a day.

The Court: Well, I'm going to get over this legal **[28]** hurdle on reliance.

Mr. Green: It's been exhaustively briefed, Judge, by all of us.

The Court: That's a threshold matter I think in this instance as far as whether or not this is to be declared a class action. Go ahead, Mr. Mills.

Mr. Mills: Plaintiffs have the burden of proof. There are a variety of ways they could have attempted to meet it; through request for admissions, through proposed stipulations, through the admission of evidence. They haven't done any of these things. They've made some factual assertions in their brief and these do not bring facts properly to your attention. We might say that the plaintiffs haven't met their burden of proof on a variety of issues, the most crucial one of which is the adequacy of their representation.

Mr. Green has suggested that nobody has questioned his adequacy as counsel, and that is true in a sense, but that's true primarily because one of the avenues we attempted to explore on deposition was blocked by the claim of attorney-client privilege.

One of the questions that concerns us very much in this case is plaintiffs' failure to join the underwriters. The underwriters are not just A. G. Edwards & Sons, Your Honor, there is a whole list of the underwriting syndicate towards **[29]** the back of the prospectus. Certainly it is consistent with everything that we know about the case that Mr. Green represents a member of that syndicate. He has entered his appearance in a court in the County for the partners of I. M. Simon, one

of the underwriters. We submit, Your Honor, that Mr. Green may very well have a conflict of interest that bears very much on the adequacy of representation issue that should be explored at an evidentiary hearing, but that in any event, a determination that it can proceed as a class action without an evidentiary hearing would be premature. The facts simply aren't in the record to support that kind of a finding.

* * * * * * *

[34] The Court: I understand what you said and I understand the difference of opinion. What do you say about this conflict?

Mr. Green: Which conflict?

The Court: Their statement there's possibility of conflict of interest, that you represent Simon and Simon's one of the underwriters?

Mr. Green: There's no conflict of interest at all on that case. I've given serious consideration to joining A. G. Edwards in this case.

* * * * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

(Title Omitted in Printing)

MEMORANDUM AND ORDER

(Filed July 16, 1974)

This matter is before the Court upon the motion of the defendants Coopers and Lybrand to dismiss Counts I and II as a class action.

The claimed class action status is founded upon the allegations that certain information contained in a Registration Statement and accompanying Prospectus filed by the defendant, Punta Gorda Isles, Inc., with the Securities and Exchange Commission in connection with the registration and offering to the public of $15,000,000 of debentures and 171,570 shares of its common stock, was false and misleading. Plaintiffs seek redress for the misrepresentations against various defendants pursuant to Sections 11, 12(2) and 17(a) of the Securities Act of 1933 and Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

The salient thrust of defendants' motion to dismiss revolves around the issue of reliance. Defendants contend that each member of the class must establish his own individual reliance as a prerequisite to the maintenance of a claim under 10b-5, that to do so would cause judicial chaos, and that consequently the class action should be dismissed. However, the strength of this contention has been severely limited by a myriad of cases which have practically eliminated the requirement of proving individual reliance in Rule 10b-5 class actions. *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970); *Korn v. Franchard Corp.*, 456 F.2d 1206 (1972); *Kahan v. Rosenstiel*, 424 F.2d 161 (3rd Cir., 1970), cert. den. sub nom. *Glen Alden Corp. v. Kahan*, 398 U.S. 950 (1969); *Entin v. Barg*, 60 F.R.D. 108 (E.D. Pa., 1973); *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (M,D. Pa., 1973). Cases which hold to the contrary involve situations unlike the instant one, such as where the action is based on oral misrepresentations, *Simon v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 482 F.2d 880 (5th Cir., 1973); *Morris v. Burchard*, 51 F.R.D. 530 (S.D.N.Y., 1971); *Moscarelli v. Stamm*, 288 F.Supp. 453 (E.D.N.Y., 1968), or where the written misrepresentations vary or emanate from several sources. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir., 1964); *Frankel v. Wyllie and Thornhill, Inc.*, 55 F.R.D.

330 (W.D. Va., 1972); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y., 1968); *Richard v. Cheathan*, 272 F.Supp. 148 (S.D.N.Y., 1967). Herein, the materials involved are the written Registration Statement and Prospectus disseminated so as to reach the investors. Such materials do not vary nor do they originate from several sources.

Moreover, as plaintiffs' claims go to a failure to disclose a number of factors in the Registration Statement, then "positive proof of reliance is not a prerequisite to recovery." Rather, "all that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Affiliated Ute Citizens v. United States*, supra at 153-4. At this time the threshold question of materiality must be answered in the affirmative, that a reasonable investor might have considered certain nondisclosures in the Registration Statement as important in the making of his decision.

Accordingly,

It is Hereby Ordered that the motion to dismiss be and is Denied.

/s/ H. KENNETH WANGELIN
United States District Judge

Dated this 16th day of July, 1974.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEFENDANT COOPERS & LYBRAND'S MOTION TO MODIFY THE COURT'S ORDER DATED JULY 16, 1974 RELATING TO "RELIANCE"

(Filed October . . , 1974)

Comes now defendant Coopers & Lybrand and respectfully moves the Court to modify its Order dated July 16, 1974 relating to "reliance" for the following reasons:

1. As stated in this Court's Order dated September 23, 1974, the class action question pending before the Court has yet to be determined.

2. Defendants Coopers & Lybrand has heretofore argued and represented to this Court that the question of "reliance" is an issue which the Court should fully consider in finally determining the class action questions raised by the plaintiff's motion filed on or about the 9th day of April, 1974 seeking an Order to certify this case under Rule 23.

3. The allegations in the Complaint in this purported class action allege violations of Rule 10b-5 and an analysis of said allegations clearly indicate that "misrepresentation" is the main thrust of the plaintiff's theory on which recovery is sought.

4. While the complaint also alleges nondisclosures, the preponderance of the allegations, when analyzed, are affirmative misrepresentations.

5. While individual "reliance" may not be a predicate for recovery in a pure "nondisclosure" case, the law in the Eighth Circuit, and the United States Supreme Court, is that individual "reliance" is a predicate to recovery of damages in a "misrepresentation" case under Rule 10b-5. *Myzel v. Fields*, 386 F.2d 718, 736-37 (8th Cir. 1967); *City National Bank of Ft. Smith v. Vanderbloom*, 422 F.2d 221, 230-31 (8th Cir. 1970); *SEC v. First Am. Bank and Trust Co.*, 481 F. 2d 673 (8th Cir. 1973); and *Affiliated Ute v. United States*, 406 U.S. 128 (1972).

Respectfully submitted,

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& McROBERTS
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(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISSOLVE STAY ORDER RELATING TO DISCOVERY

(Filed September 4, 1974)

Come now the plaintiffs and move that the Court enter its Order dissolving the Stay Order entered by the Court on May 14, 1974, on the following grounds:

1. On or about April 30, 1974, defendant Coopers & Lybrand filed a Motion Requesting the Court to Stay All Discovery not related to the class action determination until the class action issue is resolved; said Motion was based primarily upon defendants' desire to save the legal fees and other costs connected with discovery proceedings pending rulings on the class action motions;

2. That since discovery was stayed by the Court on May 14, 1974, the Court, although not ruling on plaintiffs' Motion for Class Action Determination, did, on July 16, 1974, overrule Coopers & Lybrand's Motion to Dismiss the class action herein; the Court has also denied Punta Gorda's Motion for Security for Costs, and in so doing, indicated in its Order, that "From the record it does not appear that the Complaint is without merit or that the plaintiff is unlikely to succeed, . . ."

3. That the within action was filed more than one year ago, and plaintiffs have been and continue to be seriously prejudiced by their inability to proceed with the normal discovery

procedures, including depositions, provided in the Federal Rules of Civil Procedure; that the longer the plaintiffs are deprived of the right to depose witnesses and review and copy documents in the defendants' possession, the weaker their case becomes, especially as certain witnesses, and documents, may become unavailable;

4. That plaintiffs estimate they will need approximately five to six months to complete their depositions and other discovery to prepare the case for trial once the stay order is lifted;

Wherefore, plaintiffs pray that the Court enter its Order dissolving the Stay Order of May 14, 1974, relating to discovery by the parties herein.

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& LANDER
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(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

FURTHER SUGGESTIONS OF PLAINTIFFS IN SUPPORT OF THEIR MOTION TO DISSOLVE STAY ORDER RELATING TO DISCOVERY

(Filed September 23, 1974)

Plaintiffs have moved the Court to dissolve the Stay Order relating to discovery which was entered on May 14, 1974, and all defendants have filed memoranda in opposition to this Motion. In their memoranda the defendants allege that following oral argument with respect to the class action motions which took place on June 24, 1974, the Court referred to the possibility of an evidentiary hearing.[1] At that time plaintiffs' counsel advised the Court that while plaintiffs had no opposition to such a hearing, he believed there was already a sufficient basis for the Court to uphold plaintiffs' Motion for Class Action Determination based upon the pleadings, the depositions of both plaintiffs, affidavits filed with the Court and oral argument of counsel. In their Briefs in Support of the Motion, plaintiffs cited numerous cases which indicated that nothing more was required for the Court to allow the class action to proceed. Additional cases were cited to demonstrate that almost every Court faced with the issue of whether or not there should be an evidentiary hearing considered it to be an utter waste of the Court's time. Under these circumstances, for any

[1] Defendant Coopers & Lybrand in its Memorandum states that the Court indicated "there would have to be an evidentiary hearing . . . Plaintiffs' counsel does not remember that the Court made a comment or entered an order *requiring* an evidentiary hearing.

of the defendants to suggest in their memoranda that the continuing existence of the Stay Order has resulted from plaintiffs' failure to request such an evidentiary hearing is the grossest possible perversion of the facts, especially in view of plaintiffs' statement in a Brief heretofore filed with the Court to the effect that they were not opposed to an evidentiary hearing if the Court deemed it necessary. Plaintiffs are convinced that sufficient evidence has been adduced to warrant the Court's class action determination, especially since the key issue in any class action determination motion, viz. reliance, has already been resolved in favor of the plaintiffs and against the defendants.[1]

While the defendants urge the Court not to dissolve the Stay Order because plaintiffs have failed to adduce evidence of actual prejudice, it should be noted that the Stay Order was entered in the first place solely on the strength of the Motion without a scrap of evidence being presented to the Court to support the Motion. The longer the defendants herein can delay the progress of this case by plaintiffs, the happier they will be. In the meantime although the defendants have fully deposed both plaintiffs, plaintiffs' case has come to a total standstill. The rules never contemplated that because defendants might incur some legal fees, they would be entitled to a Stay Order for an indefinite period of time and the Court is urged to dissolve the Stay Order, or in the alternative, either sustain plaintiffs' Motion for Class Action Determination, which would make the Stay Order a moot issue, or set a date for an evidentiary hearing with respect to this Motion if the Court deems it necessary.

[1] Notwithstanding that Mr. Riddle during oral argument specifically told the Court that reliance was required.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ORDER

(Filed September 23, 1974)

This matter is before the Court upon plaintiffs' several motions. Plaintiff has filed motions seeking an order enjoining destruction of documents by the defendant, and a motion to dissolve a Stay Order of this Court of May 14, 1974 relating to discovery, or in the alternative an Order modifying the Stay Order to order defendants to produce copies of certain documents requested by the plaintiffs.

Plaintiffs have made no showing in their motion to enjoin defendants from destruction of documents that there is any danger of such destruction and accordingly the motion will be denied. In regards to the proposed dissolution or modification of the Stay Order, the class action questions on which the Stay Order is predicated have yet to be determined. Therefore, the Stay Order will be continued. In consequence,

It Is Hereby Ordered that the motions specified above be and are Denied.

Dated this 23rd day of September, 1974.

/s/ H. KENNETH WANGELIN
United States District Judge

Anderson, Green, Fortus & Lander
Attorneys at Law
Suite 938, Chromalloy Plaza
120 South Central Avenue
St. Louis (Clayton), Missouri 63105
[314] 862-6800

September 26, 1974

Honorable H. Kenneth Wangelin
Judge, Division 3
United States District Court
United States Courthouse & Customhouse
1114 Market Street
St. Louis, Missouri 63101

Re: Cecil Livesay, et ux. vs. Punta Gorda Isles, Inc., et al.
Civil Action No. 73 C 517(3)

Dear Judge Wangelin:

The purpose of my telephone call to you yesterday was to request a pretrial conference for the purpose of determining what steps, if any, should be taken at this time by counsel to expedite the Court's ruling on plaintiffs' Motion for Class Action Determination.

The defendants have indicated in their Briefs recently filed with the Court that they believe I should request an evidentiary hearing with respect to the unresolved class action issues and while I have no objection to this hearing, or making a request therefor, I am uncertain as to what particular issue, if any, would be resolved at such a hearing. Accordingly, I should like to request a conference with the Court, with all counsel present, so that I

may obtain some guidance, at the Court's early convenience, with respect to this matter.

Yours very truly,

/s/ MARTIN M. GREEN

MMG:kg

cc: William A. Richter, Esq.

cc: John J. Hennelly, Jr., Esq.

United States Court of Appeals
Eighth Circuit

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Petitioners,
vs.
Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),
Respondents,
and
Honorable H. Kenneth Wangelin, Judge, United States District Court for the Eastern District of Missouri, Eastern Division, Room 3,
Nominal Respondent.

No. 74-1827.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

(Filed November 1, 1974)

Petitioners state:

Petitioners Seeking Writ and Relief Sought

The petitioners and the members of the class represented by them (hereinafter the petitioners and all of the members of the

class will be collectively referred to as "petitioners") in the above-entitled class action move the Court of Appeals to issue a Writ of Mandamus directing the Honorable H. Kenneth Wangelin, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division ("the Court" or "Judge Wangelin") to vacate (1) the Court's Order of May 14, 1974, staying all discovery in said action except that relating to the class action, and (2) the Court's Order of September 23, 1974, continuing said stay order.

Statement of the Facts

The facts supporting this Petition are as follows:

1. That on July 27, 1973, petitioners filed a class action against the respondents herein which was assigned to Judge Wangelin. That said class action alleges violations by the respondents of Sections 11, 12(2) and 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, for certain false and misleading statements appearing in the Prospectus in connection with the sale of respondent Punta Gorda Isles, Inc.'s stocks and bonds at their May 2, 1972, public offering;

2. That on April 9, 1974, petitioners filed their Motion for an order, pursuant to Rule 23(c), to determine that the class action may be maintained;

3. That on April 30, 1974, pursuant to an agreement between counsel, respondents, for almost two days, took the depositions of petitioners Cecil and Dorothy Livesay on all issues relating to the pending action;

4. That on April 30, 1974, within hours after respondents had completed their depositions of the same petitioners herein, respondent Coopers & Lybrand, during the course of a pretrial

conference with the Court, filed a Motion requesting a stay of discovery, except discovery relating to the class action determination, until the class action determination had been decided by the Court;

5. That on May 14, 1974, the Court ordered "that the Motion for a stay of discovery, except that relating to the class action determination, be and is Granted . . ."; that said stay order, according to the Court's Memorandum and Order, was based upon the "implications of judicial time and pecuniary economy";

6. That on or about May 15, 1974, respondent Coopers & Lybrand filed a Motion asking the Court to dismiss the class action allegations of petitioners' Complaint; that although said Motion was denied by the Court on July 16, 1974, said respondent filed a similar Motion on or about October 2, 1974, asking the Court once again to dismiss the class action allegations of petitioners' Complaint, which said motion has not to date been ruled upon by the Court;

7. That petitioners' Motion for Class Action Determination, filed on April 9, 1974, and orally argued on June 24, 1974, has also not been ruled on by the Court;

8. That on September 3, 1974, petitioners filed a Motion asking the Court to dissolve the stay order of May 14, 1974, which Motion was denied by the Court on September 23, 1974;

9. That on September 26, 1974, counsel for the petitioners wrote a letter to the Court requesting a conference with the Court and all counsel with respect to any unresolved issues relating to the anticipated ruling on petitioners' Motion for Class Action Determination;

10. That on October 4, 1974, the Court set the case for trial on December 16, 1974;

11. The May 14, 1974, and September 23, 1974, stay orders are not appealable and this Petition is the only remedy which can afford the petitioners the kind of relief sought herein;

Issue Presented

12. The issue presented is whether or not the Court below abused its discretion under the circumstances in staying all discovery, except that discovery relating to the class action determination, until such time as the class action determination is made;

Reasons Why Writ of Mandamus Should Issue

13. The Writ should issue for the following reasons:

(i) The original stay order was based upon the Court's finding that respondent Coopers & Lybrand's "contention is a viable one considering its implications of judicial time and pecuniary economy", but there were no affidavits, testimony, documentary evidence, or any other evidence of any kind to support said respondent's Motion;

(ii) Regardless of whether the Court sustains or denies the class action determination herein, the petitioners will at that time commence full and complete discovery on all issues. Accordingly, the Court's ultimate ruling with respect to the class action determination will not obviate the need for full and complete discovery and, therefore, there will be no saving of "judicial time and pecuniary economy". It will only be delayed, to petitioners' prejudice;

(iv) For the foregoing reasons the issuance of stay orders relating to discovery is not logical and constitutes an abuse of discretion by the Court below;

(v) That since the issuance of the original stay order, petitioners' discovery has come to a complete standstill and that as

a result of petitioners' inability to pursue normal discovery procedures, including depositions, petitioners' case has been and continues to be seriously impaired and prejudiced.

* * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Cecil Livesay and Dorothy Livesay, for themselves and on behalf of all others similarly situated, Petitioners, v. Punta Gorda Isles, Inc., et al., Respondents, and Honorable H. Kenneth Wangelin, Judge, United States District Court for the Eastern District of Missouri, Eastern Division, Nominal Respondent.	No. 74-1827

Filed: November 15, 1974

Before GIBSON, Chief Judge, and HEANEY and STEPHENSON, Circuit Judges.

ORDER

It is the view of the Court that petitioner should request a prompt ruling on its motion of April 9, 1974, for an order

determining that a class action existed. If an evidentiary hearing is desired, that can likewise be requested. The trial court should then promptly rule on petitioner's motion and remove its stay order and thereafter permit discovery to proceed on the merits, postponing the actual trial date in order to permit necessary discovery.

We are satisfied that the trial court will act in compliance with the views of this Court, and, therefore, we now deny the petition for writ of mandamus.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

ANDERSON, GREEN, FORTUS & LANDER

November 18, 1974

Honorable H. Kenneth Wangelin
Judge, Division 3
United States District Court
United States Courthouse & Customhouse
1114 Market Street
St. Louis, Missouri 63101

Re: Cecil Livesay, et ux v. Punta Gorda Isles, Inc., et al.
Civil Action No. 73 C 517(3)

Dear Judge Wangelin:

In accordance with the November 15, 1974, Order of the court of appeals, I should like to request a prompt ruling on plain-

tiffs' Motion, dated April 9, 1974, for Class Action Determination.

Your Honor indicated on June 24, 1974 during the course of oral argument, that there should be a hearing after the reliance issue is resolved. Accordingly, I also ask that the Court consider this letter as a request for such hearing. I would also like to request that, prior to the hearing, the Court hold a pre-hearing conference to provide counsel with some guidance as to the scope and nature of the evidence to be adduced.

Yours very truly,

/s/ MARTIN M. GREEN

MMG:kg

cc: Veryl Riddle, Esq.

cc: Lewis R. Mills, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

TRANSCRIPT OF HEARING
St. Louis, Missouri

December 30, 1974

Transcript of testimony adduced and proceedings had in the above styled cause before the Hon. H. Kenneth Wangelin, Judge of the United States District Court, for the Eastern District of Missouri, Eastern Division.

Appearances

Anderson, Green, Fortus & Lander
120 South Central, Suite 938
St. Louis, Missouri 63105
by Mr. Martin H. Green and
Mr. Edward Lander for plaintiffs;

Bryan, Cave, McPheeters & McRoberts
500 North Broadway
St. Louis, Missouri 63102
by Mr. Veryl L. Riddle for Defendant Coopers and Lybrand;

Peper, Martin, Jensen, Maichel &
Hetlage
720 Olive Street
St. Louis, Missouri 63101
by Mr. William A. Richter and

Mr. Lewis R Mills for Defendants Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Jones, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Wade, Earl Drayton Farr, Jr. and John W. Douglas.

* * * * * * *

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[3] PLAINTIFF'S EVIDENCE

CHARLES T. TOOLEY,

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Green:

Q. Would you state your name please? A. My name is Charles, initial T. Tooley.

Q. Mr. Tooley, what is your occupation? A. I'm an officer at Mercantile Trust Company.

Q. Are you in the stock transfer department of Mercantile? [4] A. I'm in charge of it.

Q. As such, are you responsible for the stock transfer duties of Punta Gorda Isles, Incorporated? A. Yes.

Q. You handle that account? A. They're one of our customer accounts.

Q. You're familiar, of course, with the fact that Punta Gorda made a public offering on May 2nd, 1972, are you not? A. I'm not sure of the date, but I know it was May of '72, yes.

Q. As transfer agent for Punta Gorda Isles, what are your duties, in other words, what do you do? A. We mainly do the work of the corporate secretary, maintaining the records of stockholders, issuing certificates to—stock certificates to purchasers, cancelling certificates representing shares sold by former stockholders, maintaining the records. We prepare labels, certified copies of lists, pay dividends from time to time.

Q. Now, Mr. Tooley, in addition to Mercantile Trust Company there is another transfer agent, is there not? A. On the common stock, yes, Chemical Bank.

Q. Is that Chemical Bank and Trust Company in New York City? A. Yes, 770 Broadway, New York, New York.

[5] Q. Now, with respect to Mercantile's record keeping system on the transfer of all securities of Punta Gorda Isles, does Mercantile keep a microfilm system that permanently records all transfers? A. We do have a microfilm system that records a recap of all of the transactions for a given year. Our computer records are purged at the end of the year and they're reduced to microfilm.

Q. And then the microfilms are kept as permanent records, is that correct? A. That's correct, yes, sir.

Q. Is your microfilm system also kept as permanent records, the transfers made by Chemical Bank on the common stock? A. It would include those transfers because they send advice copies to us for posting.

Q. Now, Mercantile, of course, is located in St. Louis is it not? A. That's correct.

Q. Are those microfilm records kept here in St. Louis? A. Yes they are.

Q. Are they kept at Mercantile Trust Company? A. Yes, sir.

Q. Are you in charge of that department? A. Yes, sir.

[6] Q. And upon appropriate order of this Court, I assume you would make them available, naturally, with all the time and effort that's necessary to go through them and dig them up? A. Yes, I would assume we'd have to have permission from Punta Gorda. We're only an agent in our capacity here.

Q. I understand. Now, sometimes stocks or bonds are bought and sold in what known as a street name, is that correct? A. That's correct.

Q. Do you know what street name means, will tell us for the record? A. Securities registered in the name of a broker which are held in the broker's name rather than being further transferred into the name of the purchaser.

Q. So that your records would only show that they're held in the broker's name in some instances, and not in the customer name, isn't that correct? A. There would be some instances where securities are held for a long extended period of time in the name of the broker, that's correct, or various brokers or nominees.

Q. Or nominees? A. Uh huh.

Q. And we would then have to go to the brokers or the persons handling those transfers to obtain the names of the **[7]**

actual beneficial owners? A. That's right. Our records would not reflect that.

Mr. Green: I believe that's all.

Mr. Richter: No questions, Your Honor.

Mr. Riddle: None, Your Honor.

Examination

By the Court:

Q. Mr. Tooley, as I understand the gist of your testimony, that you did have available records of all transfers of Punta Gorda securities, either debentures or common stock that have occurred through your particular official position, or that have been handled under the supervision of the Chemical Bank in New York City, is that correct, sir? A. Well, Your Honor, I'd have to amend that slightly. We have in our office the cancelled certificates which have been presented to us for transfer in St. Louis. I do not have the cancelled certificates which have been transferred in New York. The Chemical Bank would have those. I receive from Chemical Bank a sheet on a daily basis or on such other time interval as they have transfer showing the certificates cancelled by number, name, prefix and shares, and showing the same information for the certificates issued with the addition of address.

Q. What types of securities, if I may use that broad term, have you handled in connection with Punta Gorda? A. My supervision is limited to the common stock. **[8]** The debentures—there is a debenture issue tied in with this public offering and that is handled by Otto Johnson, another Vice-President there in the bank. However, Bankers Trust Company in New York at 485 Lexington Avenue is the principal trustee on that issue, and our services on the debentures are limited to the cancellation of a certificate, the issuance of a new certificate, preparation of an advice sheet and then we send the new certifi-

cate out to the purchaser and we send the cancelled certificate and the advice sheet to Bankers Trust Company, so on the debentures we have very little in the way of records. We have a copy of the advice sheet.

Q. Well now, is there any fixed relation between the transfer of the common stock and the debentures? In other words, does one indicate the transfer of another, or can they be done independently? A. They're independent, sir.

Q. They're independent, all right. Next question: Do your records indicate the date of the transfer? A. Of the various transfers, cancellation and the issuance, yes, sir.

Q. Do they also indicate the price? A. No.

Q. The price is not shown? A. No, sir.

[9] The Court: I have no further questions. Either one of you gentlemen have anything more?

Mr. Richter: No, Your Honor.

The Witness: Could I just add one point?

The Court: Certainly.

The Witness: To clarify these records, the advice copies which we maintain in the case of the debentures reflect debit entries and credit entries which are then posted on the books at Bankers Trust Company as Trustee for the debenture issue. In the case of the common stock, Chemical Bank makes transfers and sends advice copies to us for posting on our computer. We have a consolidated posting on the computer. However, because of the fact that the transfers pertaining to this particular transaction and the transfers pertaining to other transactions representing normal purchases in sales, are listed on the same sheets. The only identification of the transactions relating to this transaction, the one that's under study here, would be by certificate number. In other words, we would know which certificates were issued on the initial offering to identify those. To identify those

shares we would have to refer back to that certificate number to be sure it was included in that group and then the identity of the transfer can best be obtained from the examination of the cancelled certificates which are filed in chronological order.

[10] Now, the cancelled certificates representing New York transfers would be filed in similar order, but would be maintained at their office, and I believe the examination of the certificates would be easier than examination of the computer records.

The Court: Anything further, gentlemen? May the witness be excused? Thank you, Mr. Tooley.

Who do you have next?

Mr. Green: Judge, at this time I'd like to add a further stipulation into the record, and that is Mr. Mills who represents Punta Gorda has agreed to stipulate for the record that Punta Gorda has a stockholder's list in addition to what information Mercantile Trust has, isn't that correct?

Mr. Mills: I did not say in addition. They do have a stockholder's list.

Mr. Green: That's the stipulation I wanted to get.

The Court: So that I may be fully advised, gentlemen, as I understand what that stipulation is, that the defendant Punta Gorda maintains in its offices or office, a complete list of issuances, transfer, et cetera, of all its stock and debentures, is that right or wrong?

Mr. Mills: They maintain that list through Mercantile Trust Company, Your Honor, which is their transfer agent. Mercantile Trust Company maintains a stock register, stockholder's list.

[11] The Court: The certificate or the security, or whatever you want to call it, has on its face or on its back or somewhere imprinted that the transfer agent is such and such an institution?

Mr. Mills: Yes, Your Honor.

The Court: And let's assume that I buy a debenture from somebody or through a broker or however, and in order to have that issued in my name I must then take the certificate that I purchased, or have my broker do it, and take it down to the Merc or wherever and say here, and they then make the transfer and forward me a similar security in lieu of the one I've traded in, is that correct?

* * * * * * *

CECIL H. LIVESAY,

[12] was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Green:

Q. State your name please. A. Cecil, middle initial H, Livesay.

Q. And where do you live, Mr. Livesay? A. 955 Greenway, Glendale, Missouri.

Q. What is your occupation or profession? A. Chief of Police.

Q. Of what city? A. Glendale.

Q. Are you married? A. I am.

Q. And who is your wife? A. Dorothy Livesay.

Q. Is she here in court with you today? A. She is.

Q. Are you and Mrs. Livesay the two representative plaintiffs in this lawsuit which is being heard today? A. Yes, sir, we are.

Q. And did you purchase at the May 2nd, 1972 public offering of Punta Gorda securities, five thousand dollars face amount

of their debentures and one hundred shares of their **[13]** common stock at eighteen dollars per share? A. I did.

Q. And were those stocks recorded in the name of you and your wife? A. They were.

The Court: A hundred shares of common and five thousand dollars worth of debentures, right?

Mr. Green: Yes.

The Court: All right, go ahead.

Q. And did you make the investment decision basically on behalf of yourself and your wife? A. Yes, I did.

Q. Subsequent to the public offering, did you sell your debentures and common stock at a loss? A. I did.

Q. And was that loss approximately $2,650.00? A. Yes, that's about correct.

* * * * * * * *

[16] Q. Did you, prior to contacting me, obtain a copy of the annual report for 1972 of Punta Gorda Isles? A. Yes, sir, I did.

Q. By that time had you sold your stock, or were you still the owner of—stock and bonds? Did you still own the securities? A. I sold the stock in October of 1972.

The Court: Now, when did you get this financial statement? After that time?

[17] The Witness: Yes, sir.

The Court: All right, go ahead.

Q. And then you started to indicate that you consulted a lawyer, and when was that that you consulted a lawyer? A. May of 1973.

Q. And I, of course, was that lawyer, isn't that right? A. Yes, sir.

Q. And did we have several meetings in May and June of 1973 where we discussed these doubts and concerns that you had about the Punta Gorda prospectus and your purchase of Punta Gorda securities at public offering? A. Yes, sir, we had several meetings.

Q. And did I ultimately agree, and my firm, to represent you in an action on your behalf, your wife's behalf, and on behalf of a class composed of all people who purchased Punta Gorda securities at the public offering? A. Yes, sir, you did.

Mr. Riddle: Please the Court, I understand that this is being tried before the Court, it's a preliminary matter. Those are patent, leading and suggestive questions calling for conclusions.

The Court: I understand, counsel, and the Court regards them in that fashion. You may proceed. It may save a little time.

Q. Mr. Livesay, have you agreed to foot the bill, so **[18]** to speak, for the cost and expenses of this litigation?

Mr. Riddle: Please the Court, I think that even goes farther than a liberal attitude.

The Court: Well, let me say this, and I don't want to be facetious, gentlemen, and I haven't the remotest idea of what the cost of this litigation is going to amount to, and I assume counsel is not asking the witness to give him carte blanche or to sign an open note or anything of that nature.

Mr. Green: Not really.

The Court: I assume—let me ask the question this way: You have retained counsel here to represent you in this matter. Incidentally, when in May, if you can recall, in May of '73, did you first speak with counsel about this matter?

The Witness: Your Honor, just in May of '73. I couldn't give you a date.

The Court: You couldn't tell me early, late or middle?

The Witness: I'm sorry, I could not, Your Honor.

The Court: And as I understand, you're agreeing to, I assume, pay the costs within reason, but you're not saying—are you telling this Court that regardless of what—you're speaking about court costs now, or attorney's fees?

Mr. Green: No, not attorney's fees, I'm talking **[19]** about court costs and expenses for depositions and things of that nature, but not legal fees.

The Court: All right, you may answer.

A. Yes, sir, I have agreed to pay the expenses and the court costs.

Mr. Green: I believe that's all.

• • • • • • •

[20] Cross-Examination

By Mr. Richter:

Q. Mr. Livesay, as I understand your testimony, you've agreed with Mr. Green to pay him, or to pay for the expenses of this lawsuit, regardless of how large those expenses will be, is that correct? A. I have agreed to pay for the expenses, yes, sir, that's true.

Q. And you've agreed to do that regardless of whether or not there's any recovery in this case, is that correct? **[21]** A. That's true.

Q. And has Mr. Green advised you that those expenses could be very much greater than the $2,625.00 you lost on this security? A. He's told me approximately what it might be.

Q. What statement has he given you as to the amount of those expenses? A. He said it might be in excess of $5,000.00.

Q. Did he tell you how much in excess of $5,000.00 those expenses might be? A. No, he said that would probably be pretty close.

Q. Have you also agreed to pay him a fee in this lawsuit? A. No, I have not.

Q. Well, you recall when we took your deposition some months ago, do you not? A. I do.

Q. Do you recall what you said at that deposition about a fee? A. Well, I remember how I corrected it. I wasn't referring to his fee. I know the class action suit, that the fee is awarded by the Judge.

Q. Didn't you initially testify, before you had a chance to talk to your counsel, that you had agreed to pay him a fee? **[22]** A. I stated that. I was confused. I knew that wasn't so.

Q. Then after you talked to your attorney at the second session of the deposition, you corrected that testimony, is that correct? A. I did.

Q. Was it your initial understanding that you were going to have to pay Mr. Green's fee regardless of the outcome of the lawsuit? A. I knew I wasn't going to.

Q. You were or were not? A. I knew I was not going to have to.

Q. But you testified just the opposite when I took your deposition. A. I did.

Q. Isn't that correct? A. I did.

Q. Before you filed this suit, did you discuss with Mr. Green on whose behalf this suit should be filed? A. I'm sorry, I don't understand the question.

Q. Well, did you discuss with him whether this should be a suit on your behalf for the $2,625.00 you had lost on this security? A. We discussed whether—yes, whether it would be a class action suit.

[23] Q. Well, did you discuss with him at all whether you should merely sue on your own behalf? A. Yes.

Q. Well, when I took your deposition back in April, April 19th of this year, didn't you tell me that you did not discuss with him whether you should sue alone for your own loss? A. No, I can't recall that. I said—I think I said I don't know how I could just sue on my behalf if indeed there was fraud. Everyone that bought the stock and everyone bought the debentures would be equally entitled to share in this.

Q. What is your current understanding as to whether you could have sued on your own behalf in this case?

Mr. Green: Let me object because that's not the same question. Before I think the question was whether we had discussed that. Now he's saying his current understanding and suggesting that it has changed.

Q. Let me just ask you this: Did Mr. Green—I'll withdraw that question, Your Honor, to obviate the objection.

Did Mr. Green ever tell you before you filed this suit that you had the right just to sue on your own behalf for your own loss? A. I think he did.

Q. Would your recollection in April of 1974 have been **[24]** better than your recollection right now on that point? A. No.

Q. You mean your recollection's gotten better as time has gone on? A. No, I said it wouldn't be any better.

Q. What if your recollection then was different than your recollection now, don't you think your recollection then would have been better than it is now? A. No.

Q. Did you and Mr. Green discuss prior to the filing of this lawsuit the parties who should be sued as defendants in this suit? A. We did.

Q. And did you discuss the joining of the underwriters as defendants? A. It was brought up.

Q. Who brought that subject up? A. Mr. Green said that he would have to make an investigation and see what parties were liable, and he stated that if the underwriters were liable, we would also join them.

Q. And did he later make a recommendation to you as to whether or not the underwriters should be joined? A. He did.

Q. What was his recommendation? A. That they should not.

[25] Q. And did he tell you the basis for that recommendation? A. He said that he would not see that they were liable in any way, and it would seriously damage our case if we did join them.

Q. Before filing this lawsuit, did he tell you that he represented, and did represent at that time one of the underwriters? A. He did.

Q. Did he tell you the basis on which he had concluded the underwriters were not liable? A. Yes, he said there were a group of underwriters and he didn't see how they could have all had this knowledge and to go before a jury and expect all of them to enjoin all of them and how they could have this advance knowledge that the directors of the company had.

Q. Now, you understand that you coming in here and purporting to represent all of the people who purchased the Punta Gorda stock and debentures at the public offering on May 2nd, and possibly May 3rd of 1972, isn't that correct? A. I understand that.

Q. What do you understand your obligations to be with respect to representing all those people in this lawsuit? A. That I pursue the case as vigorously and as fairly as possible and be represented by the very best attorneys I can possibly be.

[26] Q. At the time you filed this lawsuit, did your attorney tell you exactly what investigation he had conducted with respect to whether the underwriters should be joined? A. At the time the lawsuit was filed?

Q. Right. A. He told me about all the investigation he did. I can't recall all of it.

Q. Can you remember anything he told you he did? A. Yes, I can.

Q. What? A. Well, he's made trips to Florida.

Q. Before this suit was filed? A. I can't remember the dates of the trips.

Q. You can't remember whether or not he made a trip to Florida before he filed this suit, is that correct? A. That is correct.

Q. What I'm asking you, and I want you to pay attention to this question: What investigation did he tell you he made with respect to joining the underwriters before this suit was filed? A. He said he made an extensive investigation; in his opinion the underwriters were not liable in any way.

Q. But can you remember one specific thing he told you that he had investigated that led him to that conclusion? A. No, not offhand.

[27] Q. Did he explain to you what would happen after this suit was filed with respect to trying to learn the facts about your claim? A. I'm sorry, would you repeat the question?

Q. Did he explain to you before the suit was filed what would happen after the suit was filed with respect to attempting to learn the facts about your claim? A. I still don't understand——

Q. Did he tell you there would have to be a lot of investigation, formal investigation made under the Court's supervision to try and get facts to try and prove your claim? A. Yes.

Q. And did he tell you that that investigation might reveal many things you did not know at the time you filed that suit? A. No.

Q. Did he tell you that that investigation might establish that the defendant who you did sue were not liable? A. No, he didn't tell me that.

Q. Did he tell you that that investigation might reveal that other people such as the underwriters may be liable? A. No.

Q. He just told you that he had decided that the underwriters weren't liable, and they shouldn't be sued, is that it? **[28]** A. No, he said he made an investigation.

Q. Did he tell you that he decided that the results of his investigation showed that the underwriters were not liable? A. They were not liable, and it would seriously hurt our case if we joined them.

Q. Did he tell you how it would hurt the case to join the underwriters? A. Yes, to just sue—to join everyone that signed their name to it, and to bring everyone into Court and to hear a jury—have a jury stating that everyone had signed their name to this, that we were going to sue them and when they're not liable would hurt our case.

Q. Did he say anything to you about whether or not it was the usual practice by attorneys who handle these types of cases and by plaintiffs who bring these types of cases to sue the underwriters that sold the security?

Mr. Green: Let me object to the implication as to any usual practice. It's a fact that's not in evidence. Are you just asking if I said that?

Mr. Richter: I object to him testifying, coaching the witness here in court, Your Honor. I asked whether he said anything about it, whether that was the usual practice. I very carefully phrased that question that way.

Mr. Green: I noticed that, but I'm objecting because **[29]** it's irrelevant.

The Court: As I've indicated earlier, gentlemen, unless the question is clearly far beyond any possible issue in the case, the Court's going to let the evidence in subject, of course, to the objection. You may proceed.

Q. Do you understand the question? A. I do. I can't remember if Mr. Green said anything about it. I know many times underwriters are joined in the suit.

Q. You knew that at the time you filed this case, is that correct? A. I did.

Q. But you don't recall whether or not Mr. Green discussed what the usual practice was with you? A. I don't.

Q. And did you know that that was done frequently at the time you filed this suit; that is, the joining of the underwriters? A. I don't know the frequency. I wouldn't know if it was a third of the time or half the time, but I know that they are frequently joined.

Q. And you knew that at the time you filed the suit? A. I did.

Q. Let me ask you this: Why did you file a suit as a class action where you could incur expenses substantially **[30]** more than your loss, rather than really suing for the $2,625.00 you lost? A. Well, I know—I know that the expenses can be awarded back to me from the Court on a class action suit, and I would leave it up to my attorney on what the best type of suit is to be filed.

Q. So you left the decision whether to file a class action or individual suit up to Mr. Green? A. Absolutely. It was a joint decision, but I would certainly rely on his advice.

Q. At the time I took you deposition you testified, did you not, that you did not understand it that you could recover on your own deal? A. I can't recall.

Q. I asked you on page 92:

"Question: And are you seeking recovery on behalf of yourself and your wife in this case, even if the class can't recover? Answer: No."

You remember when we went through that discussion?

"Question: You don't want to recover in this suit if the class can't recover, is that correct? Answer: Well, I know this is a class action suit. Question: Well, if it is not a class action suit, are you still making the claim for your own loss, just for you and your wife in that case? Answer: No. Question: If it is not a good class action **[31]** suit, you don't want to recover in this case, is that correct? A. Answer: I don't want to recover."

Now, do you remember that discussion? A. Yes, I do.

Q. Do you remember similar discussion perhaps with Mr. Hennelly and Mr. Mills? A. I do.

Q. Did you indicate at that deposition you did not understand you could have sued on your own behalf?

Mr. Green: Let me object, because if there's such a statement I think it should come from the deposition.

Mr. Richter: I want to ask his recollection at this time.

Mr. Green: Well, if there's a reference to a deposition, I think it should be a specific reference instead of a summary.

The Court: Well, gentlemen, there's two ways to proceed. One is to ask: Did you make this statement, or was this question asked, and did you make the statement?

The other is to lay the foundation in general terms if that statement was made, and, gentlemen, if you're going to get into deposition cross-examination it's fine with me but let me just say this much in fairness to both parties: Where you get into whether or not the question was asked or statement was made in deposition the Court would appreciate **[32]** having the book and page.

Q. Yes, Your Honor. I think I'll go on to another question, I'm about finished, Your Honor.

Did Mr. Green tell you whether or not he discussed representation of you in this case with his client, I. M. Simon, before this suit was filed? A. He said he investigated it.

Q. Did he say he had discussed representation of you in this suit with I. M. Simon? A. I can't recall.

Q. When he told you about his representation of I. M. Simon, did he indicate or did he tell you that this created a conflict of interest between you as a representative of the class and himself? A. No.

Q. As a representative of one of the underwriters? A. No, he said if he—if it did represent a conflict of interest he would rather—he would tell me at that time and rather give me the name of another attorney.

Q. So did you understand from that that it was his position there was no conflict of interest that he had in this case between his representation of you and his representation of I. M. Simon? A. Yes, that there was no conflict of interest.

Mr. Richter: I have no further questions.

[33] **Cross-Examination**

By Mr. Riddle:

Q. You pronounce your name Livesay? A. Livesay.

Q. Livesay? A. Yes, sir.

Q. Sir, you are the Chief of Police in the Village of Glendale? A. Yes, sir.

Q. How long have you held that position? A. Chief of Police for five years.

Q. How old a man are you? A. Forty-one.

Q. And before being Chief of Police, what office or what work did you engage in? A. I was a police officer.

Q. How long have you been a police officer, sir? A. Eighteen years.

Q. You've been a police officer almost all of your mature life then? A. I have.

Q. Have you had any income other than what you have earned as a policeman through those years? A. Yes, investments in property and stocks and bonds.

Q. And the money with which you made those investments **[34]** did that all come from—originally from your salary as a police officer? A. Mine and my wife's.

Q. Have you inherited any money? A. I have not.

Q. And what is your formal education, sir? A. One semester in college.

Q. Your wife work? A. She does.

Q. And what is her salary now per year? A. Ten thousand.

Q. And what is your salary, sir? A. Sixteen.

Q. Is that before the deductions? A. Yes, it is.

Q. In both instances? A. Yes, it is.

The Court: I take it you mean the word "withholding"?

Q. Yes I do, thank you, Your Honor.

Sir, with respect to your present financial position, and I don't intend to delve into it in any great detail, but do you have a bank account? A. I do.

Q. What bank? A. Boatmen's Bank. **[35]** Checking, savings.

Q. Do you do business with any bank other than Boatmen's? A. With savings and loan companies.

Q. What savings and loan company? A. Lafayette Federal, Community Federal, Carondelet Savings and Loan.

Q. Aare all of your accounts in you and your wife's joint name? A. Yes.

Q. Sir, just in general, not asking you to be specific, but what's your present balance in your checking account? A. Checking?

Q. Yes. A. A thousand.

Q. And what is the total of your savings account at the various institutions that you've given us? A. Several thousand.

Q. Give us—— A. Three or four thousand.

Q. They'd all total three or four thousand? A. In savings and loan?

Q. Yes. A. Yes.

Q. Plus a thousand dollars in the checking acocunt, makes a total of about four thousand dollars in cash? **[36]** A. Yes.

Q. In addition to that, what property do you own, sir? A. My house at 955 Greenway.

Q. And is there a mortgage against it? A. Yes.

Q. And what's the amount of the mortgage against it? A. About ten or eleven thousand.

Q. And how long have you owned that house? A. Nine or ten years.

Q. How much did you pay for it? A. Twenty-two

Q. Twenty-two thousand? A. Twenty-two.

Q. Have you made any major improvements to the house? By that I mean in excess of a thousand dollars or in excess of five thousand dollars to it? A. No.

Mr. Green: Just a minute. I want to object to this line of questioning. I think it's really getting to the point where it's so far afield as to be irrelevant. Improvements to his home.

The Court: Well, I previously indicated, let the matter get in. I assume the thrust of counsel's question, and if it's not for this purpose the objection will be sustained, but I assume that this witness has testified that he's agreed **[37]** to pay expenses which can range in excess of five thousand dollars. Now, willingness is one thing and ability is something else. If you're going to any other reason, Mr. Riddle——

Mr. Riddle: There is no other reason, otherwise it would be an invasion of this gentleman's privacy, and I wouldn't purport and attempt to do that.

The Court: All right, go ahead.

Q. Your answer was that you made no major improvements to the house in excess of a thousand or two thousand dollars since you purchased it? A. No, I think the asking price of the house at the time was thirty-five thousand.

Q. Sir, do you have any other property besides your home and what you've told us about in the banks and savings and loan? A. No.

Q. Other than your household goods and household accessories? A. No.

Q. And do you have an automobile? A. Two automobiles.

Q. And what sizes are they? A. Volkswagen and a Ford.

Q. You have children? **[38]** A. I do.

Q. What model is your Ford? A. '70 Ford.

Q. '70 model? A. Yes.

Q. And what model is your Volkswagen? A. '71.

Q. Are there mortgages against those cars? A. No.

Q. Now, sir, are there any mortgages outstanding against any of your household appliances? A. None.

Q. Have you told us all the property you hold? A. All the property, yes.

Q. Do you have any debts other than the nine or so thousand dollars owing on your home? A. None.

Q. Mr. Livesay, I understand your testimony to be that you had a net loss of $2,650.00 from the purchase and sale of these securities? A. I did.

Q. Now, has it been made clear to you by Mr. Green the type of expenses that are likely to be incurred in this lawsuit? A. He made it extremely clear.

[39] Q. Did he make it clear to you the type of expenses that would be incurred if it were allowed, and if this Honorable Court allowed this case to proceed as a class action? A. Yes, he did.

Q. Did he tell you the number of depositions that would be necessary to take? A. He did.

Q. What did he tell you in that regard? A. He said it would probably run three thousand dollars.

Q. No, the number of depositions. A. The number. Well, he said he wants to—he wants to take these depositions. He's extremely eager and he didn't name the number, but I know he wants to do it with the directors, the auditors—I mean the accountants, with everyone he possibly can.

Q. Did he tell you that it may involve taking as many as fifty depositions? A. He didn't say the number. He said there would be considerable depositions to be taken.

Q. Well, he did mention all the individual defendants, as well as anybody else throughout the country that might have some knowledge about this case? A. Yes, sir.

Q. Sir, did you inquire as to what the price of a **[40]** deposition, one deposition would be? A. No.

Q. In the course of this case so far there have been some depositions taken. Have you been submitted a bill for those charges? A. Yes.

Q. Have you paid them? A. I have.

Q. Did you get an idea from those charges about what a deposition might be? A. Yes.

Q. How much have you paid by deposition charges so far? A. A deposition charge for sixty dollars.

Q. Sixty dollars? A. Sixty.

Q. That's just you and your wife's deposition? A. I paid sixty dollars for deposition charges.

Q. Sir, have you been told by Mr. Green that it will necessitate his traveling to Florida, New York, California and other places throughout the United States to take these depositions? A. He has advised me of that, yes.

Q. Do you have an agreement with him that you will pay his travel expenses and lodging and boarding expenses for all those trips? **[41]** A. I have.

Q. Sir, have you paid for Mr. Green's trip to Florida? A. For two trips to Florida.

Q. Two trips to Florida. You have paid for those? A. I have.

Q. By check? A. I have.

Q. And what do they total? A. It was four trips, and filing fees and deposition, and it comes to $1,234.00.

Q. One thousand how much? A. Two hundred, thirty four dollars.

Q. To date? A. Yes.

Q. And there weren't any depositions taken in Florida? A. No.

Q. Sir, based on the expenses for those trips alone, where depositions weren't even taken, have you done some calculating in your own mind as to what costs might be involved to you for the taking, of example, of depositions that might last for as long as three weeks in Florida? A. I have, and I've talked to Mr. Green about it.

Q. And have you reached any conclusion as to what it might cost you, or will likely cost you to pay for, say, up to three weeks of depositions in Florida?

[42] Mr. Green: Just a minute, I want to object because he's assuming that his named plaintiff has to pay all of the costs himself. There will be evidence that there are other co-plaintiffs who have agreed to share in these costs, so when he says has this named plaintiff, does he understand that he will have to pay them, that's assuming a fact that is not in evidence, and there will be evidence of the other co-plaintiffs who have retained me, as to their willingness to share these costs and I want the Court to know that in advance. So I'm objecting to the assumption that Mr. Riddle's making which is not in evidence that this named plaintiff alone will have to bear the burden of all of these costs.

Mr. Riddle: Then I think that's very helpful and that casts a different light on this lawsuit.

Mr. Green: That's right.

Q. Do I understand that there are other people who are helping you subsidize this lawsuit? A. There has been—there's been at least four parties I know in addition to myself that have joined in it. I know the name of another individual that is going to help pay the expenses, yes.

Q. Can you give us the names of those people who are going to join in? A. Joe Morrissey is one.

Q. Where does he live? **[43]** A. He lives here in the St. Louis area.

Q. And who else? A. I know there's an attorney from—I believe he's from the west coast.

Q. An attorney from the west coast is going to join in with you? A. He is.

Q. Have you talked with the attorney from the west coast? A. I have not.

Q. Has he made an offer to contribute to the expenses of the lawsuit? A. I don't know. I just know of Mr. Morrissey has offered to contribute to the expenses of the lawsuit. He had a considerable loss.

Q. What did Mr. Morrissey say he would contribute, how many dollars and cents? A. He talked to Mr. Green.

Q. You haven't talked to him? A. I have not.

Q. What do you understand he's pledged by way of funds for this suit? A. I don't know what his arrangement is, I don't know.

Q. Then do you know whether or not he's offered to pay a single penny? **[44]** A. Yes.

Q. And how do you know that? A. Mr. Green told me so.

Q. What did Mr. Green tell you that he would contribute? A. That he would share in the expenses.

Q. To what extent? A. I don't know.

Q. Then is it your testimony to the Court that you don't know whether he'd pay a penny or a dollar or a thousand dollars? A. Well, he said he would share in expenses to pursue this lawsuit.

Q. Well, sir, sharing can be all the way from one to a hundred percent I take it, is that your understanding of it? A. Well, if he shares in it——

Mr. Green: Let me object, I think it's getting highly argumentative. He's testified as to what he knows and these questions are now just simply baiting the witness and arguing with him about this stuff.

The Court: Well, I don't know whether the witness is being baited or not, but let me get the situation clear as far as my understanding of this testimony here today is concerned.

Mr. Livesay has testified under oath that he is prepared to foot the bills and he's been examined at length **[45]** on his ability to foot the bills. It now develops that there are other people who Mr. Livesay—let me ask you this much: Have you met or discussed this litigation with any of these four or five other parties, or however many there may be, Mr. Livesay?

The Witness: No, sir, I received some correspondence from other individuals and I forwarded this information to my attorney, Mr. Green, but I have not spoke——

The Court: In other words, what I'm asking about, and I'm trying to shorten this matter if I can, gentlemen; you haven't talked, we'll say to Mr. Morrissey, who lives here in the St. Louis area; you haven't been to him and say, Now, look, it's costing me a thousand dollars or twelve hundred already, are you going to pay me part of that, or are you going to pay that much in the next bills, or—in other words, as far as any written agreement in writing which would constitute a promise to pay? You understand what I'm talking about?

The Witness: Yes, sir, I do.

The Court: You don't have any personal knowledge of that?

The Witness: I do not.

The Court: All right, go ahead. Let's take about a ten minute recess, gentlemen.

(Recess.)

[46] The Court: You may proceed.

Q. (By Mr. Riddle): In addition to the cost that Mr. Green explained to you that would be incurred in this suit, were you told that if you lost the lawsuit that the cost could be assessed against you in addition to those that you had advanced? A. Yes, sir, I was told that.

Q. Was any figure given you as to what those costs could potentially be? A. No, he said it could be substantial.

Q. Substantial? A. Yes.

Q. Do you understand that to be in excess of ten thousand dollars? A. No, I wouldn't think it would be that much.

Q. You think it would be as much as five thousand dollars? A. Yes.

Q. That would be five thousand dollars in addition to the five thousand dollars you'd have to advance. A. Pardon me?

Q. That would be five thousand dollars risk in addition to the five thousand dollars that you thought you might have to advance. A. I know it could run that much.

[47] Q. Or a total of ten thousand. A. I know it could run that much.

Q. Well, sir, do I understand your testimony to be that your net loss in this case was $2,650.00? A. It was.

Q. What do you understand that you and your wife, as plaintiffs in this lawsuit, what do you understand the maximum amount of a judgment is that you can recover? A. My actual losses, plus expenses involved in pursuing this case.

Q. Sir, let me see if I understand what you say. Do you understand that the judgment could be rendered in favor of you? Do you understand that would be your actual loss which was the $2,650.00 fee? A. Plus the expenses involved.

Q. Do you understand that the expenses involved would be only reimbursing you for expenses that you had paid out? A. Yes.

Q. So then is it your understanding that the maximum amount that you and your wife could hope to gain in this lawsuit would be the $2,650.00? A. That's correct, I understand that.

Q. Now, is it your position, and are you representing to this Court that you are agreeable to gambling up to **[48]** $10,000.00 in order to recover a maximum of $2,650.00? A. Well, I think you put it very strongly. I don't think it is a gamble. I was very upset about it, and I'm going to pursue it, but I don't consider it a gamble. First of all I think we're going to win this suit and I don't consider it a gamble, and——

Q. What do you consider it to be? You're putting up at least a maximum of $10,000.00 as against getting $2,650.00. You don't consider that a gamble of sorts? A. Well, I know I'm taking a chance to lose more than I stand to gain, but again, I don't consider it a gamble.

Q. Now, Mr. Livesay, have you reached an agreement with Mr. Green as to how he would be compensated? A. How he would be compensated?

Q. Yes. A. Yes, I have.

Q. What is that amount? A. He would be awarded the fees by the Court. If he loses the case there would be no fee.

Q. You have no commitment to Mr. Green to pay him for his services? A. None whatsoever.

Q. Do you have an understanding with Mr. Green that if he were to succeed and be awarded a sizeable attorney's fee that any part of that would be paid to you? **[49]** A. None.

Q. You don't have any such agreement? A. Do not.

Q. Nor understanding? A. No.

Q. Now, have you purchased any other stock or any other securities in the past? A. I have.

Q. Through the same broker? A. Yes.

Q. And what's the broker's name? A. Ben Soffer.

Q. And he's with G. H. Walker and Company? A. No, he's with H. E. Edwards. I now have an account with G. H. Walker.

Q. Now, what are the size or number of the purchases that you've made of stocks or securities? A. I think I said in a deposition that over the years it would be between seventy-five and a hundred.

Q. Thousand? A. No.

Q. Seventy-five and a hundred different purchases? A. Separate purchases.

The Court: Transactions?

The Witness: Yes, sir, Your Honor.

[50] Q. And you don't hold any of those securities now? A. Yes, sir, I do. When you said before about property I thought you was talking about real estate. I used to own some rental property.

Q. What securities do you own now? A. I own a hundred shares of IBM. I own two hundred shares of Sperry-Rand. I own two hundred shares of Merck Drug.

Q. Of what? A. Merck, M-e-r-c-k, Drug. I own five thousand dollars debentures of Greyhound Computer. I own four

thousand dollars in debentures in Liberty Leasing. I own five thousand dollars of Booth Debentures, fifteen hundred shares approximately of American Realty Trust and their warrants, fifty shares of Michigan Mobile Homes. I believe that's it.

Q. Are they all in the account that you now have with G. H. Walker? A. Yes, sir.

Q. What's the value of that account as of today? A. Well, I have also some money just in my account that's just sitting there, between sixty to seventy thousand dollars.

Q. Is that what the worth of all of your assets in that account is today? A. Yes, sixty, seventy thousand dollars.

The Court: Let me ask a question here, and you **[51]** may be more experienced than I am in that area, be able to advise me, but as I understand it, there are different kinds of accounts. One kind is where you call your broker up and say buy this, or sell that, and then there's another type of an account which I believe they call a discretionary account, is that the word? Where you just say here's "x" dollars and you manage it for me. Is this account one over which you have control and order your broker to do this or that, or the other, or is it an account where the broker makes the investment and just lets you know what's happened?

The Witness: No, sir, Your Honor, I make all the decisions.

The Court: All right, go ahead.

Q. And you have on all of these purchases? A. Every one of them.

Q. You only use a broker as your agent for buying and selling? A. Yes, sir.

Q. How long have you been buying and selling stock in the fashion you've described? A. Since 1961.

Q. And have you been successful? Have you made gains through those years? A. I've had some losses, I've had some gains. '74—this was a good year.

[52] Q. '74 was a good year? A. Yes, sir.

Q. Have you gained in more years than you've lost? A. Yes, sir.

Q. You made all those decisions on your own? A. Absolutely. I like to, especially now, but when I first started out I listened to a broker much more than I did now, but now I make all the decisions on my own.

Q. Sir, I'm not sure that the record is entirely clear on this. I believe it needs to be. Is your commitment to this Court unconditional that you will pay the expenses necessary if this were to be allowed to proceed as a class action? A. Would you repeat the question?

Q. Is your commitment to this Court that—and is it unconditional that you personally will be responsible for all of the expenses that are incurred? A. It is——

Q. In this action, if it goes forward as a class action? A. Yes, that is my commitment, that I will bear the expenses.

* * * * * * *

[63] Q. Sir, the record may not be clear on this, but I want to ask you a few questions and I'll make it just as short as I can. At the time that you were discussing the filing of this suit with Mr. Green did you tell him you wanted to bring a class action? A. We talked about which would be the best and I said that I did want to bring a class action, yes.

Q. Were you told that you had the option of bringing **[64]** a suit in your own name, or that you could bring it as a class action? A. Yes.

Q. You were told that you had that option? A. Yes, I was.

Q. Sir, you remember when your deposition was taken back in May of 1974? A. I do.

The Court: What page are you on?

Mr. Riddle: Page 99.

A. I do.

Mr. Richter: Volume II.

Q. Volume II, top of the page. You remember this question being asked you, and these answers being given:

"Question: Well, do you understand that you could have sued on your own? Answer: That I could have sued on my own? No, I would think it would have to be a class action suit. Question: Why do you think it would have to be a class action suit? Answer: Well, because there were a number of other shareholders. Everyone who purchased this read the same prospectus and got it at the same price with probably the same information. Question: You don't think you could have gone into Court by yourself and sued? Answer: No."

Do you remember those questions and those answers **[65]** being given? A. I remember the answers.

Q. You remember this question being asked you, and this answer being given:

"Question: Could you tell me in your own words who you think is in your class that you represent in this lawsuit? Answer: All the individuals that purchased the stock, and the debentures that particular date at that public offering." A. I remember that.

Q. Sir, what is your testimony here today? Is it your view here today that you could have filed this suit in your own name without it being a class action? A. Yes, I knew it.

Q. At all times? A. Yes. You know, I was confused by the questions, but I knew that you could and I know that even if

you don't, if it's not a class action suit, that you can proceed on your own afterwards. Yeah, I knew it.

Mr. Riddle: I believe I have no further questions.

The Court: Mr. Green?

Redirect Examination

By Mr. Green:

Q. Mr. Livesay, Mr. Riddle asked you some questions about your home, and he asked you the amount of the mortgage, which I believe you said was ten or eleven thousand dollars, **[66]** and I believe he asked you what you paid for the house, which I believe you testified was twenty-two thousand dollars, is that correct? A. Yes, it is.

Q. What is the present market value of your home? A. Fifty thousand.

Q. So would you then have forty thousand dollars equity in your home? A. Yes, sir, I would.

Q. And that would constitute part of your overall assets? A. Yes, sir, it would.

Q. Mr. Livesay, prior to your retaining me to represent you and the punitive class in this case, we have been friends for in excess of some ten or twelve years, isn't that correct? A. Yes, sir, we have.

Mr. Green: No further questions.

Mr. Richter: Nothing further, Your Honor.

Mr. Riddle: Nothing further, Your Honor.

Examination

By the Court:

Q. Mr. Livesay, have you talked to any of these other people personally who have bought this original debenture and stock?

A. Some people—I don't know if they're the ones—some people have corresponded with me and written me letters, **[67]** and some people have called me on the telephone and when they do this I refer them to Mr. Green.

Q. Well, my question was: In other words, have you ever eye-balled anybody or shaken hands with them or discussed with them who bought this same new issue at the time you did? A. I understand, Your Honor. No, I have not.

Q. Have you ever been involved in any class action litigation prior to this lawsuit, or what purports to be a class action or is requested to be? A. Yes, sir, I have.

Q. In other words, when did you first learn in point of time about class actions? A. Well, you know—I've known about class actions for—since I've been reading the Wall Street Journal, but once I bought some——

Q. Reason I asked, you seemed to have some expertise along that line. I understand you're not a practicing lawyer? A. No, sir.

Q. But you have indicated by some of your answers that you understand opt in and opt out, and whether you can bring another lawsuit and whether you can't, and things of that nature, so it may be a matter of some interest to you, is that correct? A. Yes, sir.

Q. And you were aware of class actions prior to the **[68]** time that you discussed the matter with Mr. Green, is that correct? A. I was aware of class action.

Q. Where was your class action that you were involved in brought before? A. It was against Revenue Properties.

Q. In what court? A. In Boston.

Q. In Boston? A. Yes, sir.

Q. And that was handled in the Federal Court in Boston? A. Yes, sir, it was.

Q. Was it handled by a Boston attorney? A. Yes, sir.

Q. Was it declared to be a class action? A. It was.

Q. Was it settled or did it proceed to trial? A. It proceeded to trial.

Q. And you testified in the matter? A. No, sir; no, sir. I was just a shareholder in it, I just bought the same stock.

Q. Were you the plaintiff or a member of a class, is what I'm trying to get to? A. Yes, sir, I was just a member of the class, nothing else.

[69] Q. Do you have any knowledge of how the people who correspond with you got your name, or how they happened to write you? A. Yes, sir.

Q. Well, can you tell me what it was? A. They read it in the newspapers or saw it—heard it on a news broadcast, and it was in the Wall Street Journal too, Your Honor.

Q. This lawsuit—the fact that this lawsuit was brought was in the Wall Street Journal, is that right? A. Yes, sir, it was.

Q. Now, I want to ask you this question, and I certainly don't want to disturb your relationship with Mrs. Livesay, but you have indicated some firm commitments here on these costs, and I am not taking the position that I'm trying to collect them or anything, but while we're on the subject, you have also testified that practically all your holdings, stocks, C.D.'s, and buildings and loans, property, et cetera, are jointly held by you and your wife, is that correct? A. Yes, sir, that is correct.

The Court: Well, I just want you gentlemen to know that as far as I understand the law, he can only commit himself as to what he's got in his own name and committing Mrs. Livesay may be another proposition. I'm not suggesting **[70]**

that she should or shouldn't, but I wanted that to be clear in the record. I have nothing further, gentlemen.

* * * * * * *

[72] **Recross-Examination**

By Mr. Riddle:

Q. As you sit here today, Mr. Livesay, without prejudicing anybody's position, would you be inclined to take your net loss and forget about this lawsuit as opposed to pursuing it as a class action? A. Pardon me?

Q. As you sit right here today would you be inclined **[73]** to accept your net loss as opposed to pursuing this cause of action as a class action? A. I would be opposed to that. I think that Mr. Green received a phone call to that effect.

Q. What you're telling the Court is if some greenback is placed on this desk in front of you that wholly compensated you for your loss, that you would refuse to accept it? A. That's true.

Mr. Riddle: All right.

The Court: Anything else, gentlemen? One thing, gentlemen, for the record that the Court's concerned about. I take it that the proposed class is only those who purchased new issue? In other words, the thrust of my question is: Assuming, arguendo, without deciding, that this was declared to be a class action, would we wind up with more than one class? Because it's quite obvious from the testimony here that the class of those who might have purchased ten days, two weeks later, other than the original, might be in a different position legally.

Mr. Richter: Paragraph 4 of the stipulation, Your Honor.

The Court: Well, I haven't got a chance to read it all, but that takes care of it?

Mr. Green: Yes, we've agreed there's only one class for those who purchased in the two-day period of the [74] public offering.

The Court: Now, gentlemen, the Court's not in any hurry at all. We've got all afternoon. Can you give me some idea of how much further testimony there will be?

Mr. Green: Yes, I can. The remaining witnesses will be Mrs. Livesay and I will testify and that's it.

The Court: Can you give me any information as to whether you gentlemen will have testimony?

Mr. Richter: Your Honor, we will not put on any witnesses. Our further presentation will consist only of cross-examination.

The Court: I assume then we will probably be able to terminate this hearing today, is that correct?

Mr. Riddle: I'm sure that's right, Your Honor.

Mr. Green: No questions, Your Honor.

(Discussion off the record.)

The Court: May the witness be excused?

Mr. Green: Yes, he'll remain here for the hearing.

The Court: Thank you, sir.

DOROTHY LIVESAY,

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Green:

[75] Q. State your name and address please. A. Dorothy Livesay, 955 Greenway, Glendale, Missouri.

Q. And Mrs. Livesay, you are the wife of Cecil Livesay, who just testified and you are named co-plaintiff in this case, is that correct? A. That's correct.

Q. And you have heard all of Mr. Livesay's testimony with respect to—in connection with this hearing, have you not? A. I have.

Q. Now, Mrs. Livesay, you have heard the issue raised with respect to your attitude towards the commitment that Mr. Livesay has made to pay the cost and expenses of this litigation. Do you share his commitment? A. Yes, I do.

Mr. Green: No further questions.

Cross-Examination

By Mr. Richter:

Q. Mrs. Livesay, did you have any meetings with Mr. Green prior to filing this lawsuit? A. Yes, I did.

Q. Did you take any part in the decision of whether this suit should be filed on your own behalf, or on behalf of a class? A. No, I did not.

[76] Q. Did you take any part in any decision as to whom should be joined as defendants in this lawsuit? A. No, I did not.

Q. Do you have an understanding who decided who should be joined as defendants in this lawsuit? A. Yes.

Q. What is your understanding as to who decided that? A. I understand it was between my husband and our attorney.

Q. Were you given any recommendation as to whom should be joined in this lawsuit? A. No, because I left it all up to my husband.

Q. Were you told before this lawsuit was filed how much it could cost you? A. I think it was mentioned, but I really don't know if it was before.

Q. You don't remember whether there was any discussion or not, is that right? A. No, I don't.

Q. Did you agree before this lawsuit was filed to pay the expenses of the lawsuit regardless of whether you won? A. I did.

Q. And who did you agree with? A. My husband.

Q. Did you tell Mr. Green that you would pay the expense **[77]** of this lawsuit before it was filed regardless of who won? A. I don't recall.

Q. When you told your husband you'd pay the expenses, did he tell you how much they might be? A. I don't remember if he told me at that time.

Q. Has anyone told you after this lawsuit started how much the expenses of it might be? A. I've heard a figure what it might be.

Q. And what figure have you heard? A. Around five thousand.

Q. From whom did you hear that figure? A. I believe I heard it from both my husband and my attorney.

Q. Is it based on that five thousand dollar figure that you just testified that you're agreeable to have your funds used to pay the expenses of this suit? A. No.

Q. If the expenses were twenty-five thousand dollars would you be willing to pay that? A. I'd be willing to go along with whatever my husband thought was the thing we should do.

Q. That's not my question.

The Court: She's answered it.

Q. Would you be willing to pay twenty-five thousand dollars if you lost this lawsuit? **[78]** A. If my husband said that we should, yes.

Q. Now, Mrs. Livesay, do you know anything more about what this suit is about than you did when we took your deposition? A. No, not really.

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[84] Q. You did not read the prospectus? A. No.

Q. And did you participate with your husband in making the decision to buy? A. No.

Q. You left that up to him entirely? A. That's correct, that's correct.

Q. So you relied on your husband? A. That's correct.

Q. Now, did he discuss the fact that he was thinking about selling the Punta Gorda securities? A. He mentioned he might sell it, yes.

Q. Did he tell you why? A. He was losing money.

Q. Did he give you any other reason? A. Not that I recall.

Q. Did he tell you at the time that he was thinking about selling the stock, that the prospectus didn't tell the truth? A. I don't know, I don't think it was then. I don't know when it was.

Q. No—on about the time that he sold the stock did he tell you that the prospectus did not tell the truth in it? A. I don't know if it was at that itme.

[85] Q. Do you remember when your deposition was taken? A. Yes.

Q. This is on Page 30. Do you remember this question being asked you and this answer given:

"Question: Did your husbnd say anything to you about the prospectus being incorrect before he sold the stock?"

And then Mr. Green said: "Same objection, and the same instructions to Mrs. Livesay. In other words, that she is not to answer it because it constitutes privileged information."

And then the question by Mr. Richter was as follows, and you remember this question:

"Question: Mrs. Livesay, when did you first obtain any information that the prospectus might be incorrect?

Answer: He mentioned——

Mr. Green: Just a minute.

Mr. Richter: I asked you when you first obtained this information."

And your answer: "I don't recall."

And this question, this answer being given:

"Do you recall whether it was before or after your husband sold your Punta Gorda securities? Answer: Before."

Do you remember those answers?

A. I remember them but I was confused at the time.

Q. You were confused then?

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[87] **MARTIN M. GREEN**

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

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Direct Examination

By Mr. Lander:

Q. Would you state your name, Mr. Green? A. Martin M. Green.

Q. You're a member of the law firm of Anderson, **[88]** Green, Fortus and Lander? A. Yes.

Q. What is your background as far as how long you've been practicing law? A. I've been practicing law in St. Louis for sixteen years, and I'm a member of the highest Court of this State and the United States Supreme Court and I specialize in securities litigation.

* * * * * * *

[92] Q. Would you list the possible other defendants that you considered? A. Yes, I considered as other possible defendants the lead underwriter in this case, A. G. Edwards. I considered joining the law firm of—I think it's Farr, Farr and somebody else, who's counsel to Punta Gorda Isles. I considered the possibility of joining the law firm of Peper, Martin who was counsel to A. G. Edwards. I considered the possibility of joining another accounting firm, I can't recall the name, who I believe to have been involved in doing some of the accounting in this matter, other than Lybrand. I considered the possibility of joining a firm of engineers that were involved in much of Punta Gorda's work and I ultimately reached a conclusion as to who I felt should be joined in this case.

Q. Do you care to give the Court your reasoning for not including other defendants? A. Yes, while the——

The Court: Well, unless you want to burden the record with that, gentlemen, I'll take his decision at face value as far as he's concerned. If you gentlemen want his **[93]** reasoning in the record, well and good, but——

Q. They could cross-examine him if they want to get into that then, Your Honor.

Mr. Green, do you represent other individuals or businesses that would be members of the class if that determination were to be made by the Court?

A. Yes, in addition to representing the Livesays, subsequent to the filing of this lawsuit, I have been retained by other individuals to represent them with respect to their losses arising from the public offering, Punta Gorda.

Those individuals are the following: Mr. and Mrs. Joseph Morrissey, who live in—who are neighbors of mine and have

been friends of mine for some twenty-five years. They called me. They sustained a loss of $140,000.00. They had purchased a quarter of a million dollars worth of the debentures and two thousand shares of the common stock. They asked me to represent them and indicated a willingness to share in the payment of any costs and expenses. These are two people who are—very substantial wealth, they're millionaires, and have indicated that, don't worry about the costs, we'll help out with them if you need any help.

I have been retained to represent a fund in Los Angeles called The Shareholders.

Q. Capital? A. Capital Fund. They sustained losses in excess of **[94]** half a million dollars, and while they would not be a suitable class representative because they're not individuals, they have agreed to share in the costs if they were called upon to do so.

I have been retained to represent a lawyer named Nichols in St. Louis and his wife, Harry Nichols, who sustained a loss of approximately $5,000.00 on his purchase of $10,000.00 worth of the debentures at this public offering.

I have been retained to represent a company in Dallas called Regal Capital Company through their lawyer, a Mr. Rosenberg from Dallas. Regal Capital is owned by an individual and he sustained a loss of $18,000.00.

I have been retained to represent a Mr. David Kleg and his wife and child, who live in Salt Lake City, and they sustained a loss of—I believe $50,000.00.

Q. Are there others? A. I was asked to represent a man in Maryland, but he would not be part of the class because he bought his securities quite a bit before the public offering, and so I couldn't represent him, and I'm trying to think if there are any others. Seems to me that that's the extent of the others who have asked me to represent them.

Q. In the event that class action determination is not granted, would the other clients that you represent, would you intend to file separate suits on their behalf in **[95]** different districts. A. Well, if it could be avoided with respect to the local people who lose money in the underwriting, I would probably ask leave, and I really haven't made a final decision on this yet; leave to join them into this case. With respect to the non-St. Louis funds and individuals, I have specific instructions and suits will be filed in those cities with local counsel.

* * * * * * *

[103] Q. How long have you represented I. M. Simon before you filed this lawsuit? A. I think I represented them for the first time in 1968 or '69.

Q. And have you continued to represent Simon since filing this lawsuit? A. Yes.

Q. Approximately what percentage of your time have you spent in the year and a half approximately since filing this lawsuit on matters on behalf of I. M. Simon? A. Not too much. I would estimate maybe two or three or four percent of my time. I represent them really in a perfunctory way now with respect to some litigation that **[104]** they're involved in in other cities and I'm sort of the local man to provide them with the facts of the cases as they develop.

Q. You, in effect, supervise their out-of-town litigation? A. I don't supervise it, I receive information. The real work is——

Q. Do you coordinate it? A. Yes, that's correct.

Q. And you do handle their local litigation, do you not? A. Yes, I do.

Q. Do you render business advice to them in connection with their legal problems? A. Yes, I do, from time to time.

Q. Could you be considered their outside general counsel? A. Well, together with Bryan, Cave I suppose I could. We're

both—we both represent them in different matters from time to time. I would say probably I do more of the work for this firm than Bryan, Cave.

Q. And is I. M. Simon a substantial and valued client of your firm? A. In terms of dollars and cents, no. They're valued, yes. In terms of financial value, no.

Q. Over the years they have not been a substantially valuable client? A. Yes, in 1969 and '70 I would say they were more **[105]** valuable financially to me then because they were doing some underwritings and I was doing the legal work. At the current time, no.

Q. Wouldn't you expect in the future, providing the country doesn't completely go out of business, that they will continue to be a substantial and valued client? A. I would hope so.

Q. Exactly what investigation did you make of this lawsuit prior to the time you filed it? A. As I said, I read numerous volumes and works to make sure that I fully understood the significance of the so-called accounting and environmental problems that were confronting me.

* * * * * * *

[108] The Court: Counsel, is the thrust of all these questions having anything to do with the Simon matter?

Mr. Richter: Yes, Your Honor.

The Court: Well, I have no prejudgment about the matter in any way at this time, but assuming, arguendo, that he should have sued Simon, does his intent or whether he had an intent make any difference?

Mr. Richter: Well, Your Honor, you could take the position that on the surface there is a basic conflict of interest.

The Court: I understand that, but does his intent—in other words, the questions you're asking him now is what he's reviewed prior to that time and all this and that and the other,

and I'm not saying he was right or wrong, that's a matter that has to be decided, but the thing I'm getting at is, as a practicing lawyer, whether or not there's a conflict as far as I'm concerned. Of course, if a man openly intends to do something that involves a conflict, well and good. And, of course, intent is proven by acts, but I don't think that a lawyer's intent is one of the basic elements of a conflict. If there's a conflict there there's a conflict there. His knowledge may have something to do with it.

[109] Now, I may be wrong, maybe you have to have intent.

Mr. Richter: No, Your Honor, I think we certainly take the position just on the face of it there's a conflict, but we want to go further and develop the underlying facts with respect to that conflict.

The Court: All right. Well, let's get into them instead of what this gentleman's read.

Mr. Richter: Well, Your Honor, I think his prior investigation is material to the question of his not joining the underwriters in the case, and we don't know how this evidence is going to come out, but we think it should be in the record and we would have anticipated that Mr. Green would have put it on. He didn't. We think it's incumbent——

The Court: Well, go ahead and get into it then.

Mr. Richter: We think it's important that what we expect and hope to be a denial of class action certification will be supportable on the whole record in addition to the other matters that have already been developed.

The Court: You may proceed.

Q. Did you talk to Mr. Briloff before filing the suit? A. No, I've never talked to him.

Q. Have you retained in your files materials which you read before filing the suit? A. I believe so.

Q. Now, did you conduct any investigation apart from **[110]** your reading? A. Yes.

Q. And tell me each person that you talked to in conducting that investigation. A. The primary person that I interviewed was a Robert A. Rosenthal. He is a Vice-President of Drexel-Burnham and Company who, at the time of this underwriting, was the syndicate man at I.M. Simon and Company and I questioned him about I.M. Simon's involvement in the underwriting, the extent of their investigation, if any; what he knew about A.G. Edward's participation in this underwriting. Well, there were numerous interviews with him. I talked to him at some length prior to filing this suit.

Q. What did he tell you about I.M. Simon's investigation in connection with this underwriting? A. He said that their investigation in this case was the same type of investigation that occurred in every other underwriting that they had ever been involved in, as minority underwriters. In other words, as compared to being the lead underwriter.

Q. And what was that? A. And that they left it up to A.G. Edwards and their counsel to protect their interest in this underwriting because A.G. Edwards was the principal underwriter.

Q. And what did he tell you about—excuse me, were **[111]** you finished? A. Go ahead, I'm sorry. I really basically finished the answer to that question.

Q. And you said you talked with him about A. G. Edwards' participation. What did he tell you about A. G. Edwards' participation? A. Well, he told me that he felt that in his opinion that they had done everything possible to find out that the prospectus and registration statement were accurate and correct.

Q. That Edwards had? A. That Edwards had, and that he knew some of the—he knew the law firm for A.G. Edwards, and had high respect for them. We sort of together discussed that, and that they were very competent, and that I believe as I

recall that there had been what is known in the industry as a due diligence meeting which he and some others attended in St. Louis where they received information about Punta Gorda, and to some extent relied upon that.

Q. Did he tell you what he understood Edwards had done in connection with his statement that Edwards had done everything possible to investigate in connection with the underwriting? A. This has been about two years ago—just really just expressed confidence that in his opinion, once again, **[112]** that if there was indeed a fraud in this prospectus, that in his opinion A.G. Edwards was clean, and that it would not have participated in it, and to his knowledge made a suitable investigation.

The Court: Well now, as far as this due diligence meeting was concerned, do I understand your testimony to be that it was your information that both the representative of A.G. Edwards and of I.M. Simon were participants in that meeting?

The Witness: As I recall, representatives of all the St. Louis based underwriters were present.

The Court: That would include Edwards and Simon?

The Witness: Yes.

The Court: All right, go ahead.

The Witness: This is, to the best of my knowledge. I am pretty sure that was what was said to me.

Q. So basically you relied on Edwards' reputation in having done an adequate due diligence investigation? A. I would say that's true to some extent, yes, and I believe that others in the firm at I.M. Simon, he indicated had been in touch with A.G. Edwards in connection with finding out how many shares they would be given in the underwriting and things of that nature, and they were satisfied that at least they felt it was a clean deal.

Q. Did you talk to anyone else, other than Robert **[113]** Rosenthal? A. Now, I spoke to a Mr. Carter Lewis. Carter Lewis was at the time of this underwriting the——

Q. Before filing the suit? A. That's what I'm getting ready to say, it was either just before I filed the suit, and then again after I filed the suit, because he asked me to send him a copy of the Complaint, which I did, and that would, of course, tell me that I spoke to him at least once after suit was filed. I called him a third time and he indicated that Mr. Mills was his lawyer and at that point I then did not question him any further.

Q. What did Mr. Lewis tell you? A. He felt that there was —he was shocked, and I read him excerpts from the prospectus——

Mr. Richter: Excuse me, Your Honor, I move to strike "he was shocked". I asked what Mr. Lewis had told him.

The Court: Overruled.

A. He said "I'm shocked," is what he said to me. "Frankly," he said, "I'm shocked."

I read him excerpts from the prospectus. He did a lot of—he asked me a lot of questions. He indicated he was retired from A. G. Edwards at the time, so that might help with the exact time that I questioned him. And when I read him excerpts, his comment was: "You mean to tell me **[114]** that that's in the prospectus?" And I read him parts about the accounting and about the environmental considerations and he said: "I'm shocked."

And then I called him back and subsequently sent him a copy of the Complaint or the Amended Complaint. I'm not sure.

Q. Is there anything else that he said to you? A. They were relatively brief conversations. I can't recall in great detail. He was away from St. Louis when I tried to call him on several occasions, and I finally caught him at home on the telephone one night.

Q. Basically it is a fair statement that basically he stated he was shocked at the contents of the prospectus? A. Yes, I remember he said: "You're kidding. It says that?" Referring to the prospectus, yes.

Q. Did you talk to anyone else prior to filing the lawsuit in connection with your investigation? A. Well, I, of course, talked to other lawyers in my office. I read several cases, I recall that, where lawsuits were filed in connection with a faulty, alleged faulty prospectus where the underwriting syndicate, I believe, or others who in some cases are joined as defendants, were not joined.

Q. You recall any of those cases? A. I think one of them, if I'm not mistaken, was called **[115]** In Re: KMF Actions, a Massachusetts District Court case. I remember that one by name. It was a derivative action, but the principal is the same.

Q. Did you discuss with Mr. Rosenthal the possibility of joining the lead underwriter, or joining the undewriters as defendants? A. I don't think I asked him his opinion as to what I should do in this lawsuit, no.

Q. Did you discuss the possibility with him? A. Probably.

Q. Did he give you his opinion? A. No.

Q. Did he give you his reaction? A. No, I really only asked him for facts.

Q. Had he left Simon at the time you talked with him? A. Yes.

Q. Did you talk with anyone else who had been with Simon at the time of the offering or who was with Simon at the time you talked with them? A. Are you talking about prior to filing suit?

Q. Prior to filing suit. A. I don't think so. I notified them afterwards that I had filed this suit, but I don't think I actually interviewed or talked with anybody before.

Q. Is there anyone else you talked to on your pre-suit **[116]** investigation of the facts? A. I'm trying to think. I seem to recall making three or four phone calls to people to get some background information, which wasn't necessarily related to the issue which is on the table now, but I can't recall who it was. I just have to see my file at the office. There were several other people I believe.

Q. After filing the lawsuit, did you continue to evaluate and investigate the possibility of joining the underwriters? A. I evaluated, as I now have continued to evaluate, the entire situation. I haven't seriously considered joining any of the underwriters, as you know, that I haven't so far taken any depositions, which might be a factor in establishing some liability on the part of A. G. Edwards and Company, but I don't know.

Q. You testified on your direct testimony, and you named by name a number of other clients in connection with this lawsuit. Do you have any written agreement with any of those companies or individuals with respect to sharing in the payment of any of the expenses of this lawsuit? A. No, just verbal conversations.

Q. And have any of those clients made any specific agreement as to the amount of the expenses, the dollar amount of expenses they would pay, or as to the percentage of expenses **[117]** they would pay? A. They have not.

Q. Prior to the filing of the suit, did you discuss with Chief Livesay the possibility of joining a lead underwriter over the underwriters in the suit? A. Yes.

Q. And just to shortcut things, is it basically accurate that you're the one who ultimately made the decision not to join the underwriters? A. That would be correct.

Q. And did you explain to the Livesays that—strike that.

Did you have any agreement with the Livesays with respect to payment of expenses of the suit if the suit were not successful? Did you, before filing the suit? A. Yes, I did.

Q. And what was that agreement? A. Well, as I said, they agreed to foot the bill on this.

Q. Regardless of what the expenses might be? A. I gave them a rough idea from my own experience as to what I believed the Court costs and other expenses of this litigation would be, and they did agree to pay it.

Q. What was the total amount, both Court costs and expenses? A. I said that it would exceed five thousand dollars, **[118]** probably something close to it, but I wasn't really sure and that, you know, I just wouldn't know until the costs were incurred.

Q. For everything, Court costs and expenses? A. Well, the Court costs were only $15.00.

Q. Well, there's going to be a number of depositions which you will be taking, and I don't want to stand here and quibble, Marty. A. No, I understand.

Q. Let me ask you this before I get into it. What's your current estimate of what the Court costs and expenses would be of pursuing this lawsuit to completion? A. In excess of five thousand dollars, but it's a moot issue at this point because the others have agreed to chip in and cover this.

Q. Well, I don't think it's a moot issue because if the figure is more like twenty-five thousand dollars, which I believe from my experience to be much more realistic, I think we might have an entirely different attitude on the part of the plaintiffs than an estimate of five thousand dollars, and I wanted to get your professional, expert opinion as to what the costs and expenses in this case might run. A. As I said, it will exceed five thousand dollars. If, by some most unusual circumstances, it should run twenty- **[119]** five thousand dollars, those costs will be paid.

Q. By whom? A. My clients.

Q. The Livesays?

The Court: Gentlemen, they're on the record here that they're going all the way, and that they're both going to share in expenses if necessary. Court takes judicial notice of that.

Mr. Richter: I'll drop that, Your Honor.

The Court: It's in the record.

Q. Yes, sir. Have you, to this point, retained any expert witnesses in this case? A. I have not.

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Cross-Examination

By Mr. Riddle:

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[123] Q. So, if you've got a thousand people who discovered the alleged fraud during that time interim, you would have a thousand separate fact questions? A. They would simply be excused from the class, yes, that's correct. They would not be part of the class if they were barred by the Statute of Limitations and the defendants could prove it.

Q. Well, you're purporting to represent a class though that purchased on May 2nd, 1972, aren't you? A. And the 3rd.

Q. And the 3rd, of '72? A. Yes.

Q. Yes, sir. Now then, with respect to Section 10 (b) of your claim and to draw focus on this, you speak about your client Mr. Morrissey? A. Yes.

Q. Who bought how many shares of—or how many debentures? A. Both. He bought $250,000 worth of the debentures and two thousand shares of the common stock.

Q. Is Mr. Morrissey in the class that your client purports to lead, would like to lead? **[124]** A. That's up to the Court. I would say as far as I'm concerned he is.

Q. Yes, if the Court were to sustain your motion, is Mr. Morrissey then a part of the class that you and your client would lead? A. Yes.

Q. Now then, is it your opinion that Mr. Morrissey would need to establish as a fact that he relied on the prospectus in his 10 (b) (5) Count, and would he have to establish to the satisfaction of the fact-finder that he relied in fact on the prospectus? A. Depends on how you define "rely." If you define "rely" to mean that reliance is presumed once you show the Court or jury that there were material misstatements or omissions in the prospectus, and then reliance is presumed to be conclusive, yes, reliance is then required in that sense only.

Q. Then let's assume in that sense—if I understand His Honor's statement at the outset of this hearing, that reliance is necessary to be proved in a 10 (b) (5) case——

The Court: What I indicated was that I had previously ruled that it was not, and I have changed my mind, and I think I told all counsel prior to this hearing that I was so going to do. Go ahead.

Q. Then in Mr. Morrissey's case, as I understand it, **[125]** it would be necessary for him to show that he relied on one of the misrepresentations in the prospectus, one of the alleged misrepresentations, in order to show the causation between the alleged fraud and his damages. A. See, I don't know how the Court is going to instruct the jury at that time.

Q. Well now, are you saying that reliance can somehow be established without testimony from him and without a special fact-finding that he did, or did not rely on the contents or the misrepresentations in the prospectus? A. Let me explain that.

Q. Please answer the question. A. I can't answer the question unless you allow me to explain my answer.

Q. Well, answer the question and then explain it please.

(Record read)

Q. Is that question clear? A. Yes.

Q. All right, and what's your answer to it? A. The answer is yes, under some circumstances and no under others, depending on what the evidence shows at the trial.

Now, the explanation is this: If the evidence which is developed in this trial shows that what we have is purely **[126]** an omissions case; in other words, that Punta Gorda and the other defendants concealed certain facts that should have been disclosed in the prospectus, then under those circumstances reliance is under no circumstances an issue in this case. In my opinion, because I think you're asking my opinion——

Q. If, on the other hand—— A. No, if, on the other hand, the evidence in this case reveals that it's a case by merely of affirmative misrepresentations, which I don't expect it to be, but if that evidence should come out——

Q. You have made those allegations in your Complaint. A. There are some allegations of affirmative misrepresentations tied to the omissions.

Q. Excuse me, go ahead. A. Then under those circumstances, I think the Court has indicated that reliance must be proved. My opinion, which I think you wanted——

Q. Now, in that last instance, do you agree that reliance must be proved then by each of the persons within the class that you purport to lead in order for there to be a recovery to that member of the class? A. Not with respect to the liability issue. Yes, with respect to damages.

Q. Damages, yes, sir. A. I say, the Court has so indicated. I don't happen **[127]** to agree with the Court's position on that, and I'm hopeful that I can——

The Court: Let me put a question in here, and I'm referring strictly now to manageability——

Mr. Riddle: My questions are going to that, sir.

The Court: Well, I understand that, but assuming, without deciding, that this is declared to be a class action, that's number one, and let's assume that members of the class—how many are there all told?

The Witness: About 1800.

The Court: 1800.

Mr. Riddle: 1858, Your Honor.

The Court: Let's assume that we agree on a notice and everything, and I take it, first, this is a 23 (b) what?

The Witness: (3), I believe.

Mr. Riddle: It's an effort to bring it under that Rule, Your Honor.

The Court: 23 (b) (3)?

Mr. Riddle: Yes.

The Court: All right. Now then, we've got people scattered all over the country.

Mr. Riddle: Yes, Your Honor.

* * * * * * *

[132] **Examination**

By the Court:

Mr. Green, this question about adequacy of representation has been raised. I want you to understand that the questions I'm going to ask you have absolutely no personal connotation, but these gentlemen have been asking you questions about this, that and the other, and about your [illegible] and what studying you did, and all this, that and the other [illegible] and then the next thing we hear about is the Statute of Limitations.

Now, let's just assume that Punta Gorda is flat broke. Let's assume that all the named directors are bankrupt. Let's assume that Lybrand for payment of attorney's fees and other reasons

has become financially embarrassed, and that's all—in other words, let's just assume that there's no financial responsibility in the named defendants. And let's further assume that the underwriters, Edwards, Simon or whatnot, are responsible financially. I'm not talking about liability, I'm just talking about whether there's anything there to get.

Now, my question runs to this: You have not brought an action against either of the underwriters and you have explained rather thoroughly into the record your reasons. But has the Statute of Limitations—now, the evidence here today shows that Mr. Livesay came to you in May of '73 and I would assume that by the end of the month of May the fraud, **[133]** if any, was discoverable. It certainly was discoverable by the 27th day of July, which is the date of the filing of this litigation.

Now, tell me, does the Statute run against Edwards and the other underwriters? A. In my opinion it has, as to the Sections 11 and 12 (2) claims, but not as to the 10 (b) (5).

* * * * * * *

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[134] The Court: And I want to say this much, gentlemen: I have not anywheres close to—this is a very ticklish question and a very close one in some areas, but this thought also occurs to me. I'm sure you've all heard of the quote Death Knell Doctrine, and assuming, without deciding, that I rule against a class action, I think the record should be in such shape that plaintiffs could 1291 it, and go up to the Eighth Circuit and get an opinion as to whether—I'm not saying I'm going to decide it that way, but we've got a lot of problems. I don't want to waste —or not waste, but I don't want to spend two or three years with this lawsuit upstairs, and back down, and upstairs and back down, and Mr. and Mrs. Livesay and also the defendants are entitled to as speedy as possible determination of their differences. That's something else you need to think about.

* * * * * * *

POST HEARING MEMORANDUM

(Filed March 12, 1975)

* * * * * * *

The Motion Should Be Denied Because It Was Not Seasonably Made Nor Diligently Pursued

This action began on July 27, 1973. The plaintiffs' motion for a determination that it could be conducted as a class action was not filed until April 11, 1974—more than eight months after the filing of the Complaint. Oral argument of that motion was on June 24, 1974, and although the plaintiffs had been apprised of the need for evidence to support their motion (see the memorandum filed May 15, 1974, by the Punta Gorda defendants opposing the class action determination), the plaintiffs did not offer any evidence at that time. The plaintiffs' first request for an opportunity to offer evidence on the class action issues was contained in Mr. Green's letter to the Court dated November 18, 1974, shortly after the Court of Appeals denied their mandamus petition. That request did not come until more than seven months after the motion was filed and until almost sixteen months after the Complaint was filed.

* * * * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM AND ORDER

(Filed June 19, 1975)

This matter is before the Court upon the plaintiffs' motion to certify this matter as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The question of whether or not the plaintiffs and their counsel are the proper representatives for the proposed class due to an alleged conflict of interest, has also been raised by the defendants.

It is the defendants' contention that the plaintiffs are barred from maintaining this lawsuit as a class action on the grounds that there would be individual questions of fact concerning compliance with the one year statute of limitations contained in § 13 of the Securities Act of 1933, 15 U.S.C. § 77(m). It is clear that the statute of limitations as contained in the 1933 Act would control the potential recovery by members of the class. However, in the present lawsuit the common questions predominate over the individual ones. The effect of the operation of the statute of limitations as contained in the Securities Act of 1933, may be determined as to the members of the class after a general decision has been rendered upon the defendants' liability. *Bisgeier v. Fotomat Corporation*, 62 F.R.D. 113, 117 (N.D. Ill., 1972); and *Umbriac v. American Snacks, Inc.*, 388 F.Supp. 265 (E.D. Penn., 1975).

The same issue of individual questions of law and fact predominating over the common interests of the class has been raised by the defendants concerning the requirement of "reliance" for the alleged violations of the Securities Act of 1934. The Court agrees with the defendants that within the Eighth Circuit, a plaintiff must prove reliance on an individual basis to recover under the provisions of § 10(b) of the Securities Act of 1934, and Rule 10(b)5 promulgated pursuant to that Act. *City National Bank of Fort Smith v. Vanderboom*, 422 F.2d 221 (8th Cir., 1970); and *S.E.C. v. First American Bank and Trust Co.*, 481 F.2d 673 (8th Cir., 1973).

Again, as with the 1933 Act violations, the questions of "reliance" under the 1934 Act may be dealt with on an individual basis after a determination has been made as to liability concerning the entire class. *Umbriac v. American Snacks, Inc.*, supra.

While there are indeed certain individual questions of fact and law regarding this statute of limitations under the Securities Act of 1933 and the issue of "reliance" pursuant to the Securities Act of 1934, the Court is of the opinion that the common questions clearly predominate in this lawsuit and that this action may be maintained as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

A most serious attack on the pursuance of this lawsuit as a class action is made by the defendants with regards to the plaintiffs' propriety as representatives of the class, and the propriety of their representation by their counsel, Mr. Martin Green, due to an alleged conflict of interest.

At this Court's hearing concerning whether or not this lawsuit should be certified as a class action, there was considerable testimony produced regarding the question of the plaintiffs' adequacy of representation, and the alleged conflict of interest of their counsel.

This Court is of the opinion after considering the briefs filed by all parties, and a review of the transcript of the hearing, that

the plaintiffs, Cecil and Dorothy Livesay, will be adequate representatives of the class to be involved in this lawsuit. *Eisen v. Carisle and Jacquelin*, — U.S. —, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

At the hearing held by this Court for the purpose of certifying this lawsuit as a class action, counsel for the plaintiffs, Martin M. Green, stated, while under oath, that he had from time to time represented I. M. Simon and Company on matters unrelated to the public offering of securities of Punta Gorda Isles, Inc. which are presently at issue. I. M. Simon and Company was one of the underwriters in the public offering of securities of Punta Gorda Isles, Inc., which is at issue in this lawsuit. After the filing of this lawsuit, Mr. Green continued to represent I. M. Simon and Company on various matters unrelated to this action. Mr. Green stated that he had made a decision not to join I. M. Simon and Company or any other underwriter as a defendant in this lawsuit. Mr. Green has disclosed his past and present representation of I. M. Simon and Company to the plaintiffs. This Court is of the opinion that even though Mr. Green made a disclosure of his employment to the plaintiffs, a serious conflict of interest, which would go to the very heart of this action, has been raised. It appears to the Court that there have been violations of Disciplinary Rule 5-105(A) and Ethical Considerations 5-14 and 5-15 of Canon 5 of the Code of Professional Responsibility.

Such a conflict of interest clearly goes to the adequacy of the representation of the proposed class. Since the members of the class who do not decide to opt out of the litigation are bound by the named representatives, they are entitled to the best possible advocacy available. To this Court, even the remote possibility of a conflict of interest on the part of the counsel of the class representatives would cast a shadow upon the legitimacy of the entire lawsuit, and any judgment resulting therefrom.

If counsel for the plaintiffs cannot furnish adequate representation to the plaintiff class (and this Court is of the opinion that Mr. Green's relationship with I. M. Simon and Company constitutes a bar to such effective representation), he is therefore estopped from acting as counsel in this case. *Hawk Industries, Inc. v. Bausch & Lomb, Inc.*, 59 F.R.D. 619 (S.D. N.Y., 1973). The key role played by the counsel for the class representative in a class action places a duty upon this Court to zealously guard the rights of the plaintiffs to have representation free from any hint of impropriety. *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3rd Cir., 1973).

In order to insure that the plaintiffs, Cecil and Dorothy Livesay, have such adequate representation, this Court will today issue a show cause order to plaintiffs' counsel, Martin M. Green and the law firm of Anderson, Green, Fortus & Lander, to show cause why they should not be enjoined from acting as counsel for the proposed class in this lawsuit.

So that the plaintiffs, Cecil and Dorothy Livesay, will not be inconvenienced or prejudiced during the determination of the show cause order as discussed in the paragraph above, this action will be stayed in all respects until a final determination of the show cause order may be had.

When a final determination has been obtained in the matter of the show cause order, this Court will issue such further orders as it deems necessary to insure that there will be an adjudication of this matter with minimum inconvenience to all parties. In consequence,

It Is Hereby Ordered that plaintiffs' motion to certify this lawsuit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure be and is Granted; and

It Is Further Ordered that this lawsuit be certified as a class action pursuant to Rule 23(B)(3) of the Federal Rules of Civil Procedure; and

It Is Further Ordered that this lawsuit be and is stayed pending a final determination of the matters to be dealt with in this Court's show cause order to Martin M. Green, and the law firm of Anderson, Green, Fortus & Lander, said order to show cause attached to and made a part of this order.

Dated this 19th day of June, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

To: Anderson, Green, Fortus & Lander
Attorneys at Law
120 S. Central Avenue
St. Louis (Clayton), Missouri 63105

SHOW CAUSE ORDER

(Filed June 19, 1975)

Gentlemen:

You are hereby ordered to show cause why you should not be enjoined from acting as counsel for the class stated in Cecil

Livesay, et ux, for themselves and on behalf of all others similarly situated, v. Punta Gorda Isles, Inc., et al., Case No. 73 C 517 (3) now pending in the United States District Court for the Eastern District of Missouri, Eastern Division. Grounds for this Order are stated in this Court's Order filed June 19, 1975, which is attached to this Show Cause Order.

A hearing concerning this matter will be held at 10 A.M. on July 11th, 1975.

Dated this 19th day of June, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION OF MARTIN M. GREEN AND ANDERSON, GREEN, FORTUS & LANDER TO WITHDRAW AS ATTORNEYS FOR PLAINTIFFS

(Filed June 27, 1975)

Movants state:

1. That on July 27, 1973, on behalf of the named plaintiffs herein, they instituted a class action against the defendants and continued to represent them until on or about June 19, 1975, when the Court, in a Memorandum and Order filed on said date, found that a conflict of interest existed because movants also represented I. M. Simon & Co., a member of

the underwriting group which distributed certain securities of defendant, Punta Gorda Isles, Inc., at the May 2, 1972, underwriting;

2. That in view of the finding by the Court of the said conflict of interest, movants feel that they should no longer continue to represent the plaintiffs, or the class represented by the plaintiffs, as such continued representation would be detrimental to the welfare of the class;

Wherefore, Martin M. Green and Anderson, Green, Fortus & Lander move that the Court enter its Order permitting them to withdraw as counsel to Cecil and Dorothy Livesay and the class represented by them in the above-entitled action.

ANDERSON, GREEN, FORTUS
& LANDER
By MARTIN M. GREEN
Attorneys for Plaintiffs
120 South Central, Suite 938
Clayton, Missouri 63105
862-6800

June 27, 1975

MEMORANDUM FOR CLERK

Motion of Martin M. Green and Anderson, Green, Fortus & Lander to withdraw as attorneys for Cecil Livesay and Dorothy Livesay and the class represented by them is sustained, and said attorneys are hereby granted leave to withdraw as attorneys for Cecil and Dorothy Livesay and the class represented by them.

So Ordered:

/s/ H. KENNETH WANGELIN
Judge, United States District Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISSOLVE STAY ORDER

(Filed July 25, 1975)

Come now plaintiffs, by and through their attorneys, and hereby move this Court for its order dissolving its orders staying proceedings in the above entitled cause, and as grounds therefor, state the following:

1. By order of this Court dated May 13, 1974 all discovery was stayed except that relating to the class action determination. The reason for the granting of the stay at that point was to await the outcome of the ruling by this Court as to whether the plaintiffs' motion to certify this matter as a class action would be granted. By order of this Court dated June 19, 1975 said motion to so certify this lawsuit was granted, and accordingly there is no longer any reason to continue the said stay of May 13, 1974.

2. By said order dated June 19, 1975 this lawsuit was stayed pending a final determination of the matters to be dealt with in this Court's order to Martin M. Green and the law firm of Anderson, Green, Fortus & Lander to show cause why they should not be enjoined from acting as counsel for the proposed class in this lawsuit. Subsequently said lawyers have withdrawn as attorneys for the plaintiffs and new counsel have entered their appearance. Accordingly there is no longer any reason to continue the stay that was entered on June 19, 1975.

3. Plaintiffs desire to proceed with the prosecution of this action and in connection therewith desire to commence expeditiously all necessary and appropriate pre-trial discovery.

Wherefore, plaintiffs move for the order of this Court dissolving the aforesaid stay orders.

MILBERG & WEISS
1 Pennsylvania Plaza
New York, New York 10001
212/594-5300

SLONIM and ROSS
111 South Meramec, Suite 506
Clayton, Missouri 63105
725-1060
Attorneys for Plaintiffs

(Certificate of service omitted in printing.)

PEPER, MARTIN, JENSEN, MAICHEL AND HETLAGE
Attorneys at Law
720 Olive Street, Twenty-Fourth Floor
St. Louis, Missouri 63101

August 4, 1975

Mr. Bernard A. Feuerstein
Milberg & Weiss
Counselors at Law
One Pennsylvania Plaza
New York, New York 10001

Dear Bernie:

Re your letter of July 30, my notes of the meeting indicate that you planned as one early step in your discovery to explore obtaining from the transfer agents the initial registration of the stock and debentures purchased pursuant to the registration statement of May 2, 1972. I did not understand that you were

requesting us to furnish you a list of the initial registrations. However, we understand from your letter of July 30 that you are requesting us to furnish a list of the initial registered stockholders and debenture holders.

We do not have any information on the initial registration of the debentures. Accordingly, you would have to obtain such a list from Bankers Trust Company in New York which is the transfer agent for the debentures.

We have obtained a list of the initial registration of the common stock from Mercantile Trust Company of St. Louis, the transfer agent for the common stock. The transfer agent charged $360 for compiling such information, and we will furnish you a copy of the list upon receiving reimbursement of the $360. I should point out the list which we have does not include the addresses of the initial registered holders. Mercantile Trust estimates it would charge approximately $100 to provide the addresses.

Please let me know what your wishes are in this matter.

Sincerely,

WILLIAM A. RICHTER

WAR:at

cc: Veryl L. Riddle

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

MOTION
For Reconsideration, or in the Alternative, for Modification in View of the Appearance of New Counsel

(Filed August 20, 1975)

Comes now defendant, Coopers & Lybrand, and pursuant to F.R.C.P. 23(c)(1) respectfully moves the Court to reconsider, or in the alternative, for modification of its Order dated June 19, 1975 relating to the certification of this case as a class action for the following reasons:

1. This Court's Order of June 19, 1975, among other things, ordered plaintiffs' counsel to show cause why he should not be removed, etc. This action by the Court is obviously occasioned by its commendable concern that the class which plaintiffs seek to lead be adequately represented and that the rights of each member thereof be fairly and professionally represented by counsel in accordance with the canons of ethics, the rules of this Court and the Federal Rules of Civil Procedure.

2. On or about June 27, 1975 Mr. Green sought leave to withdraw as counsel for plaintiffs in lieu of showing why he should not be removed. The Court has granted Mr. Green's request to withdraw.

3. On or about June 30, 1975 Milberg & Weiss of New York City entered their appearance as counsel for plaintiffs and retained Slonim and Ross to serve as local counsel only.

4. A conference concerning this litigation was held in St. Louis, Missouri on or about July 24, 1975 and was attended by Mr. Melvin Weiss and Mr. Bernard Feuerstein of Milberg & Weiss, Mr. Richard Ross of Slonim and Ross, Mr. William A. Richter of Peper, Martin, Jensen, Maichel & Hetlage, and Veryl L. Riddle and John J. Hennelly, Jr. of Bryan, Cave, McPheeters & McRoberts. At that meeting, Mr. Weiss, a partner in the Milberg & Weiss firm, was requested to advise counsel for defendant (i) whether there were any other persons to be added as party defendants, and (ii) for his estimate of the costs and expenses that would likely be incurred in the preparation and trial of this complex case. Mr. Weiss refused to answer either question, and on July 25, 1975 new counsel filed their motion seeking to have the Court's Stay Order on Discovery lifted.

5. Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that a class action may be maintained only if the representative parties will fairly and adequately protect the interests of the class. There is no evidence before this Court establishing new counsel's suitability to represent the class or plaintiffs' commitment to new counsel to pay the costs and expenses of the litigation.

Wherefore, defendant requests the Court to consider whether plaintiffs and their present counsel are adequate representatives of the proposed class and specifically to inquire as to the suitability of plaintiffs' new attorneys, Milberg & Weiss, to represent the class and whether plaintiffs have been fully advised of the costs and expenses which could be assessed against them and whether they are committed to paying the same. Defendant further requests the Court to continue in effect its Order Staying Discovery until it has completed its consideration of these matters

(which can probably be disposed of in a brief hearing before the Court) and until plaintiffs have decided whether or not to add any additional parties.

Respectfully submitted,

VERYL L. RIDDLE
JOHN J. HENNELLY, JR.
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600
Attorneys for Defendant Coopers and Lybrand

BRYAN, CAVE, McPHEETERS
& McROBERTS
Of Counsel

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

AFFIDAVIT

(Filed September 5, 1975)

State of New York }
County of New York } ss.

Melvyn I. Weiss, being duly sworn, deposes and says:

1. I am a member of Milberg & Weiss, co-counsel for plaintiffs in the above-entitled action, and makes this affidavit in

opposition to the motion by defendant, Coopers & Lybrand, which has been joined in by the other defendants, for reconsideration of the adequacy of plaintiffs and their counsel to prosecute this class action and for reconsideration of certain aspects of this court's previously rendered decision certifying this action as a class action pursuant to Rule 23 of the FRCP.

Adequacy of Representation

2. The first issue raised by the movants for consideration is whether or not plaintiffs continue to manifest their resolve to stand behind the costs of the prosecution of this action in view of their retention of new counsel to represent them. The affidavit of Cecil and Dorothy Livesay, submitted herewith, emphatically demonstrates that there has been no change in their attitude and desire to continue as class representatives in this action and to stand behind the costs associated therewith.

3. The second issue raised by the movants concerns itself with the qualifications of new counsel for plaintiffs to prosecute the claims alleged in the complaint. Attached hereto as Exhibits "A" and "B" are short resumes of the backgrounds of Milberg & Weiss and Slonim & Ross in the field of securities and class action litigation. Milberg & Weiss has been recognized by bench and bar as specialists in such litigation. Some examples of the recognition of their expertise are the following:

A) Judge Whitman Knapp in a recent decision in **Benerofe v. Bartlett,** (S.D. N.Y.) Index No. 70 Civ. 3415, stated:

> "The competence and standing of lead counsel, the firm of Milberg & Weiss, in the area of securities law is too well known to require comment."

B) Judge Morris E. Lasker, in **Feldman v. Hanley,** 49 F.R.D. 48 (S.D. NY), stated:

". . . the long experience and demonstrated skill of Lawrence Milberg, Esq., impels the court to designate him to the position of lead counsel."

C) The Practising Law Institute has recently invited your deponent to serve as a faculty member in its "Accountant's Liability: Law and Litigation" seminar, to be given in Los Angeles and New York City during the month of October. Also serving as faculty members are two representatives of Coopers & Lybrand. A copy of the PLI brochure is annexed hereto as Exhibit "C".

D) As can be seen by the annexed resume of the firm, Milberg & Weiss has participated and is presently engaged in numerous jurisdictions throughout the country and has been in the past involved in many of the leading cases in the development of Section 10(b) liability.

4. The movants raise still a third issue on the question of adequacy of representation in the form of questioning whether certain underwriters of Punta Gorda will be added as defendants in this action. It should be noted that the present defendants have a right to name such underwriters in a third party action in which they can seek contribution and indemnity. Your deponent has analyzed many of the documents in this case and can not help but notice that the firm, Peper, Martin, Jensen, Maichel & Hetlage, represented the underwriters at the time of offering. That same firm now represents Punta Gorda in this litigation. While this court considered the question of conflict of interest as it applied to plaintiffs' counsel in its decision rendered on the class motion, the conflict in which the Peper, Martin firm finds itself was not raised. It can be reasonably asked why the defendants have not sued the undrwriters for contribution if, indeed, they believe the underwriters to be responsible for the alleged wrongs.

5. In any event, your deponent has given consideration to the question of whether or not it would be in the best interest of

the class to name the underwriters as defendants at this stage of the instant litigation. In considering the advisability of such a move, numerous factors were taken into account, some of which it is respectfully urged are within the domain of privileged communications between an attorney and his client or attorney's work product, and should not be subject to scrutiny by the adversary. However, deponent would not be reluctant to discuss these matters in private with this Honorable Court.

6. The conclusion has been reached not to name additional defendants at the present time. Plaintiffs have concluded that the primary responsibility for the wrongs alleged in the complaint rests with those defendants who are presently named. In addition, it appears that the instant defendants have sufficient means to satisfy any judgment obtained against them. The fact that the underwriters are not named as defendants will not preclude plaintiffs from seeking discovery as against the underwriters, and it is principally the information in the underwriters' possession that will assist plaintiffs in obtaining a remedy on behalf of the class against the primary wrongdoers. Clearly, the underwriters relied upon defendant Coopers & Lybrand with respect to the accounting presentations contained in the prospectus. In addition, the underwriters relied upon the company and its officers and directors to insure that the representations contained in the prospectus, both with respect to the financial presentations and environmental matters, were correct. The fact that the existing defendants have not crossclaimed against the underwriters supports such a theory. If the Peper, Martin firm, while representing Punta Gorda, concluded that the underwriters acted wrongfully, it is reasonable to assume that they would have advised their client to bring in the underwriters as third-party defendants. Under these circumstances, and further taking into account that this action has been pending since 1973, it has been concluded that it will not be in the best interests of the class to presently name additional defendants.

Request to Amend the Class Decision

7. Plaintiffs believe that this court's decision on the class motion was proper and in full accord with the existing law. A Memorandum of Law is respectfully submitted herewith in opposition to defendants' attempts to alter the prior decision of this court.

Class Definition

8. Plaintiffs take issue with the definition of the class urged by the defendants at Pages 4 and 5 of their "Suggestions in Support of Defendants' Motions". Section 11 of the Securities Act of 1933 permits any person who purchased shares pursuant to the Registration Statement to sue whether he purchased on the date of the offering or during the after market. Section 11 specifically provides that until a full twelve-month statement for a period subsequent to the date of the offering is issued by the company, a purchaser of such securities can institute an action without proving reliance and need only demonstrate that there was a material misstatement or omission in the prospectus. Plaintiffs therefore urge that the class include all persons similarly situated to the plaintiffs, to wit—any purchaser of Punta Gorda common stock or debentures who purchased during the period May 2, 1972 to the date of the issuance of the first report of earning for a full twelve-month period following the effective date of the Registration Statement, and which shares can be traced to the Registration Statement.

/s/ MELVYN I. WEISS

Sworn to before me this 4 day of September, 1975.

Flora E. Cave
Notary Public, State of New York
No. 24-0605450
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1977

[Exhibits Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in Printing)

AFFIDAVIT

(Filed September 5, 1975)

State of Missouri
County of . . . . . .

Cecil Livesay and Dorothy Livesay, being duly sworn, depose and say:

1. We are the plaintiffs in this action and make this affidavit in opposition to defendant, Coopers & Lybrand's motion for reconsideration or modification of this Court's Order dated June 19, 1975 regarding certification of this case as a class action.

2. It has been brought to our attention that, in light of the fact that we have retained new counsel for the prosecution of

this action, defendant has raised again the question whether we are willing to commit ourselves to pay the costs of this litigation.

3. We have been informed by Mr. Melvyn Weiss of Milberg & Weiss, our new attorneys in this matter, that he estimates the total cost of this litigation at about $15,000.00 with a possibility that the actual costs could exceed that amount.

4. We remain firm in our commiment to stand responsible for the costs and expenses of this action regardless of the ultimate amount involved, and we remain firm in our intention to proceed with this case as a class action.

/s/ CECIL LIVESAY
/s/ DOROTHY LIVESAY

Sworn to before me this 3rd day of September, 1975.

/s/ MARGARET C. BURHAM
Notary Public

My Commission expires Feb. 26, 1977.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM AND ORDER

(Filed October 23, 1975)

This matter is before the Court upon plaintiffs' motion to dissolve this Court's Orders staying discovery and staying the

proceeding and defendants' motions to reconsider certification of this as a class action and to modify this Court's Order certifying this as a class action.

The Court is presently concerned with plaintiffs' adequacy as representative of the class. The question of adequacy was previously raised regarding the absence of two underwriters involved in the sale of Punta Gorda Isles, Inc.'s securities as parties defendant; the result of that determination was a change of counsel for plaintiffs. The two underwriters in question at that time have still not been joined, and there is a distinct possibility that claims against them are now time barred. Not including these underwriters in the present action may affect the interests of the class generally as there is a smaller potential fund for damages if liability is found against the defendants. The interests of the subclass of those persons who made their purchases of stock and debentures from the two absent underwriters may be affected particularly.

The presence of new counsel does not in itself erase the shadow of inadequate representation previously cast. The absent underwriters should be joined immediately by plaintiffs as parties defendant to protect potential claims against them from a complete time bar. Deference, however, will be given to plaintiff if adequate reasons are given by counsel in an in-camera conference for not joining these two underwriters.

Even if the two absent underwriters are joined, the question of plaintiffs' adequacy as representatives of the class remains. Plaintiffs have shown a lack of complete willingness to protect the interests of *all* the members of the class throughout the course of this action. "[The] authorities indicate clearly that the primary criterion [for class representatives] is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process." *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465, 470 (S.D.N.Y., 1968). To decertify

this as a class action at this time based on the inadequacy of representation, however, may jeopardize potentially valid claims held by absent class members. Notice, therefore, should be sent out to the class pursuant to F.R.C.P. 23(c)(2). In this manner, the members of the class will be on notice as to the disposition of the present action and will have the opportunity to choose for themselves if they wish to be bound by the judgment that will ensue. The notice will specify first that members may exclude themselves from the class upon request, F.R.C.P. 23(c)(2)(A); that if the class member does not opt out then he will be bound by the judgment entered, F.R.C.P. 23(c)(2)(B); that if the class member does not exclude himself he may enter an appearance through counsel, F.R.C.P. 23(c)(2)(C); and that the Court requests petitions for appointment of new class representative or in the alternative, intervention by class members, F.R.C.P. 23(d)(2). To explain the Court's request for petitions or intervention, sufficient facts of the case will be given in the notice.

Before notice can be sent out, the class must be defined and the names and addresses of the class members found. To this end, the Court now turns its attention to the motions of the parties.

That part of defendant's motion to amend this Court's Order defining the class should be granted. Plaintiff will not be heard at this late date to change the composition of the class to include post-May 3, 1972, open market purchasers of Punta Gorda securities. That change, if allowed, would substantially alter the substance of this lawsuit. The determination hearing and this Court's subsequent Order certifying this as a class action were premised on the definition of the class now requested by defendant to be included in the Order. This Court now only makes explicit what had previously been impliedly accepted. Additionally, plaintiffs are now purporting to have represented these additional alleged members of the class prior

to the present motions. Waiting until the present time, considering the probable time bar affecting the claims of these alleged class members, indicates a lackadaisical disposition toward the interests of the class which does not comport with the duties of a class representative.

The class shall consist of those persons defined in paragraph 4. of the parties' stipulation.

> "The proposed class consists only of those persons who purchased Punta Gorda stocks and debentures at the public offering on May 2, 1972, pursuant to the Registration Statement and Prospectus dated May 2, 1972, and who thereafter either retained their securities or sold them at a loss, and said proposed class does not include anyone who purchased Punta Gorda securities in the open market subsequent to May 3, 1972, the date the syndicate closed."

The plaintiffs' motion to dissolve this Court's stay orders will be granted in part. Discovery shall proceed as to finding the names and addresses of the class members.

Determination of that part of defendants' motion to modify this Court's Orders relating to issues suitable for class action will be held in abeyance until the period of time given to the class members in the notice to opt out or enter an appearance has expired. This will allow any class member who may appear an opportunity to be involved in this determination. In consequence,

It Is Hereby Ordered that plaintiffs' motion to dissolve this Court's Orders staying discovery and staying the proceeding will be granted insofar as allowing discovery to proceed as to the names and addresses of members of the class; and

It Is Further Ordered that that part of defendants' motion to modify this Court's Order by defining the members of the

class to include those defined in the stipulation of the parties be and is hereby Granted; and

It Is Further Ordered that that part of defendants' motion to modify this Court's Order by defining those issues suitable for class action treatment is held in abeyance until such time as the period given in the notice to be sent out to members of the class to petition the Court or to intervene has expired; and

It Is Further Ordered that the parties shall submit proposed drafts of the notice to be sent out to the class members within thirty (30) days from the date of this Order; and

It Is Further Ordered that plaintiff is directed to join the additional parties defendant for the reasons stated above, subject only to a determination made by this Court in an in-camera conference if requested by plaintiffs' counsel.

Dated this 23rd day of October, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

MILBERG & WEISS
Counselors at Law
One Pennsylvania Plaza
New York, N.Y. 10001
(212) 594-5300

November 26, 1975

The Honorable H. Kenneth Wangelin
United States District Judge
United States District Courthouse
Eastern District of Missouri
1114 Market Street
St. Louis, Missouri 63101

Re: Livesay vs. Punta Gorda Isles, Inc.
et al., No. 73 C 517(3)

Dear Judge Wangelin:

We are in receipt of a letter dated November 21, 1975 from Bryan, Cave to your Honor enclosing a proposed Form of Notice in the above-entitled action.

It is respectfully submitted that the Bryan, Cave proposal is contrary to Rule 23, the overwhelming case law which deals with the propriety of class notices, and is not designed for the ultimate protection of the class. We submit herewith a copy of a recent 9th Circuit decision in **Blackie v. Barrack,** reported in CCH Federal Securities Report, ¶ 95,312.

It indeed seems peculiar that a defendant, whose sole interest is to avoid any recovery against it, should posture to the Court how best to protect the interests of its adversaries.

We further take this opportunity to again urge your Honor to forthwith lift the stay on substantive discovery in the instant action. Your Honor will recall that at the end of 1974 the Cir-

cuit Court suggested that your Honor would promptly decide the class question and soon thereafter remove the stay on discovery. Approximately one year has now elapsed since the Circuit Court so spoke and the clamp on substantive discovery still remains.

In view of the fact that at the last conference with your Honor, in chambers, your Honor stated that Chief Livesay and his wife are adequate representatives of the class, and further that there is no question concerning the adequacy of their new counsel, it is clear that the best interests of the class would be served if the action proceeded on the merits. This action has been pending since 1973 and we are sure that your Honor is interested in seeing the light at the end of the tunnel.

We eagerly await your Honor's prompt action on this request.

Most respectfully submitted,

MILBERG & WEISS
/s/ By MELVYN I. WEISS

MIW:mbb

CC: Veryl L. Riddle, Esq.

CC: Wm. A. Richter

UNITED STATES DISTRICT COURT
Eastern and Western Districts of Missouri
315 U. S. Court House & Custom House
St. Louis, Missouri 63101

March 1, 1976

TO: Counsel of Record

RE: Cecil Livesay, et ux,
vs.
Punta Gorda Isles, Inc., et al.,
Case No. 73 C 517 (3)

Gentlemen:

Enclosed you will find a copy of the proposed "Notice of Pendency of Class Action" which I would propose to have the plaintiff issue to all potential members of the Class.

If you have any objections, comments, or suggestions, they should be in this office no later than March 26, 1976.

Yours very truly,
/s/ H. KENNETH WANGELIN
United States District Judge

CC: Mr. Jared Specthrie
Mr. Richard Ross
Messrs. Veryl L. Riddle and
Charles G. Siebert
Mr. William A. Richter

UNITED STATES DISTRICT COURT
Eastern and Western Districts of Missouri
315 U. S. Court House & Custom House
St. Louis, Missouri 63101

April 9, 1976

TO: Counsel of Record

RE: Cecil Livesay, et ux,
vs.
Punta Gorda Isles, Inc., et al.,
Case No. 73 C 517 (3)

Gentlemen:

Enclosed you will find a copy of the "Notice of Pendency of Class Action" which counsel for the plaintiff will issue to all potential members of the Class.

Counsel for the plaintiff should make the necessary modifications in the Request for Exclusion From the Class Action, so that all potential class members will have a period of thirty (30) days from the date of the "Notice of Pendency" to "opt-out" from the above styled litigation.

Yours very truly,

/s/ H. KENNETH WANGELIN
United States District Judge

CC: Mr. Jared Specthrie
Mr. Richard Ross
Messrs. Veryl L. Riddle and
Charles G. Siebert
Mr. William A. Richter

———

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

Mail on or Before January , 1976.

Request for Exclusion From Class Action

To: William D. Rund, Clerk
United States District Court
1114 Market Street
St. Louis, Missouri 63101

The undersigned respectfully requests to be excluded from the class action in the above cause, in accordance with the terms of the Notice of Pendency of Class Action dated January , 1976.

I understand that by this request, I will not be entitled to share in the benefits of the judgment if it is favorable to the plaintiffs, and that I will not be bound by the judgment rendered in this case if it is adverse to the plaintiffs.

Dated this ..... day of ....., 197...

.....
Signature
If a Corporation or Partnership

.....
(Name)

.....
(Authorized Signature)

.....
(Position)

———

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

Proposed Notice of Pendency of Class Action

To: All Persons Who Purchased Common Stock or 6% Convertible Subordinated Debentures Due 1992 of Punta Gorda Isles, Inc. on the Public Offering of May 2, 1972.

1. This notice is given pursuant to Rule 23(c) and 23(d) of the Federal Rules of Civil Procedure and pursuant to an Order of the United States District Court for the Eastern District of Missouri, Eastern Division (the "Court") filed October 23, 1975.

2. This notice is given to all persons who purchased the shares of common stock or 6% convertible subordinated debentures due 1992, or both, of Punta Gorda Isles, Inc. at the public offering of May 2, 1972, pursuant to the Registration Statement and Prospectus dated May 2, 1972.

3. This notice is not to be understood as an expression of any opinion by this Court as to the merits of the claims or defenses asserted by the parties in this litigation, but is sent for the sole purpose of informing you of the pendency of this action and the rights which you have with respect to it.

4. On or about July 27, 1973, Cecil Livesay and Dorothy Livesay, his wife (hereinafter referred to as the "named plaintiffs"), filed a civil suit in this Court against Punta Gorda Isles, Inc., certain of its officers and directors, and its independent auditors, Coopers and Lybrand, arising out of the aforesaid public offering of common stock and debentures of Punta Gorda Isles, Inc. on May 2, 1972. This action is brought

under the provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The complaint alleges, in substance, that the Registration Statement and Prospectus upon which the public offering was based misrepresented and omitted certain material facts. In this civil action the named plaintiffs requested, among other things, that the Court determine the action to be a class action and prayed for damages on behalf of themselves and members of the class as defined in paragraph 6 hereof. All of the named defendants were served or appeared and are parties to this litigation.

5. The defendants deny all the material allegations of the complaint and deny that there were any misrepresentations or omissions with respect to the Registration Statement and Prospectus and deny any liability to the named plaintiffs or the members of the class, and have asserted various defenses.

6. The Court, by a Memorandum and Order entered on the 19th day of June 1975, and a Memorandum and Order entered the 23rd day of October 1975, directed the suit to proceed as a class action, and defined the class as being comprised of all those persons who purchased the shares of common stock or 6% convertible subordinated debentures due 1992, or both, of Punta Gorda Isles, Inc. at the public offering of May 2, 1972, pursuant to the Registration Statement and Prospectus dated May 2, 1972, and does not include anyone who purchased Punta Gorda securities in the open market subsequent to May 3, 1972, the date the syndicate closed.

7. The Court has not yet determined with respect to which particular issues this action may be maintained as a class action and has reserved its ruling on that question until after the last date by which class members may exclude themselves from the class.

8. The named plaintiffs were originally represented in this action by a St. Louis County, Missouri, law firm who withdrew as attorneys for the named plaintiffs on June 27, 1975,

after the Court indicated in its Order of June 19, 1975, that said attorneys may have had a conflict of interest which would preclude them from representing the proposed class. (They represented one of the underwriters who participated in the aforesaid public offering on matters not connected with the underwriting.) The named plaintiffs did not join any of the underwriters as defendants in this action because their original attorneys believed that their investigation revealed no grounds for asserting a claim against the underwriters. The Court in its Order of October 23, 1975, conditionally directed the named plaintiffs to join the underwriters as parties defendant; the applicable statutes of limitations, however, may now bar any claim against them.

9. In order to ensure that the interests of the absent class members will be adequately represented, the class members are invited to file with the Court petitions for the appointment of new class representatives or, in the alternative, to intervene in this action pursuant to the rights of a class member defined in paragraph 11.

10. If you satisfy the criteria for class membership set forth in paragraph 6, you will be deemed a member of the class and will be bound by the judgment entered in this action whether favorable or unfavorable to the class. You will be represented by the named plaintiffs in this action and their counsel: Milberg & Weiss, One Pennsylvania Plaza, New York, New York 10001.

11. Pursuant to Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure, you may enter your appearance in this action by counsel of your choice. As a member of the class, you have the right to state to the Court at any time whether or not you consider the representation of the class by the named plaintiffs or their counsel to be fair and adequate and you may ask the Court to substitute you and your counsel for them as class representatives. You may also intervene as a party in the action.

12. If you do not wish to be included as a member of the class of plaintiffs in this action, you may be excluded by completing the form of "Exclusion Request" enclosed with this notice, signing it and mailing it to the clerk of this Court at the address given in paragraph 13 below by mail, postmarked on or before . If your "Exclusion Request" is timely received: (a) you will be excluded from the class; (b) you will not be allowed to share in the recovery, if any; and (c) you will not be precluded from prosecuting your own claim as you will be if you do not exclude yourself from the class.

13. Please address all requests to be excluded from the class and any other communications commenting upon the conduct of this action to William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, 1114 Market Street, St. Louis, Missouri 63101.

14. This Court has retained jurisdiction of this action to correct, modify, annul, vacate and supplement the described Orders determining this cause to be a class action from time to time before a decision on the merits.

15. The pleadings and other papers filed in this action are public records, available for inspection in the office of the Clerk of the Court, United States District Court, 1114 Market Street, St. Louis, Missouri 63101.

Dated this ..... day of ....., 1976.

H. KENNETH WANGELIN
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

PLAINTIFFS' SECOND REQUEST FOR THE PRODUCTION OF DOCUMENTS FROM DEFENDANT PUNTA GORDA ISLES, INC.

(Filed July 20, 1976)

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendant Punta Gorda Isles, Inc. produce for plaintiffs' inspection and copying at the office of Slonim and Ross, 111 South Meramec Avenue, Clayton, Missouri 63105, on or before August 24, 1976 (1) a list of the names and addresses of all registered owners of the Punta Gorda common stock and 6% convertible subordinated debentures offered to the public on May 2, 1972 whose names appear on the transfer records of Punta Gorda Isles, Inc. on May 2, 1972 or at any time within ninety days thereafter and (2) such other and additional documents in the possession, custody or control of Punta Gorda Isles, Inc., or any of its transfer agents as will enable plaintiffs to send the Notice of Pendency of Class Action to all potential members of the Class.

Dated: St. Louis, Missouri
July 20, 1976

SLONIM AND ROSS
By (Illegible)
A Member of the Firm
111 South Meramec Avenue
Clayton, Missouri 63105

MILBERG & WEISS
One Pennsylvania Plaza
New York, New York 10001
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION OF DEFENDANT COOPERS AND LYBRAND TO DECERTIFY CLASS ACTION

(Filed July 23, 1976)

Comes now defendant Coopers & Lybrand and pursuant to F.R.C.P. 23(c)(1) respectively moves the court to decertify this case as a class action, for the following reasons:

1. Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that a class action may be maintained only if the representative parties will fairly and adequately protect the interests of the class members. The history of this litigation during the three years since it was filed clearly demonstrates that plaintiffs have not and will not adequately protect the interests of the absent class members.

2. Rule 23(c)(1) requires that a determination shall be made as soon as practicable after the commencement of an action as to whether it shall be maintained as a class action. Plaintiffs did not seek to have this court consider and declare this case suitable for class action treatment until April 9, 1974, over eight months after filing suit.

3. In connection with their motion for class determination, plaintiffs additionally sought to side-step their burden of showing that this case was suitable for class treatment and that plaintiffs were adequate class representatives. In spite of a clear and unequivocal instruction from the court on June 24, 1974, plaintiffs refused to present such evidence as was necessary for the court to determine whether the case was suitable for class treatment and plaintiffs were adequate class representatives. Due to plaintiffs' delay, the hearing on the class action determination was not held until December 30, 1974, approximately seventeen months after suit was filed.

4. When the hearing on the class determination was finally held, the reason for plaintiffs' reluctance to present evidence concerning their adequacy as class representatives became apparent. Plaintiffs' counsel testified that he represented a member of the underwriting group on the Punta Gorda public offering who for no apparent reason had not been named as a defendant in the action. The evidence showed additionally that the underwriters were potential defendants. Based upon this testimony, the court found and concluded that a conflict of interests existed which "cast a shadow upon the legitimacy of the entire lawsuit, and any judgment resulting therefrom." (Memorandum and Order, dated June 19, 1975, p. 4) As a result of this conflict, the court subsequently expressed serious doubts as to the adequacy of plaintiffs as representatives of the class. (Memorandum and Order, dated October 23, 1975, p. 2)

5. Approximately 13 months have passed since the court certified this case as a class action and plaintiffs' new counsel entered their appearance. During that period, plaintiffs have not discharged their duty as class representatives to vigorously prosecute the action. Plaintiffs without adequate excuse did not until July 20, 1976 institute discovery to determine the names and addresses of the absent class members. Such discovery will in all probability not be completed for many more months, and

notice of the pendency of this action will undoubtedly not reach the absent class members until the latter part of 1976, some three and one-half years after the suit was filed. This lackadaisical approach by plaintiffs to prosecuting this lawsuit demonstrates that they have not and will not adequately protect and advance the interests of the absent class members.

6. Plaintiffs' new counsel have unsuccessfully sought to expand the class to include open market purchasers. This was contrary to the interests of the absent class members in that it would, *inter alia*, have the effect of reducing the potential amount available for recovery to the class under Section 11 of the 1933 Act.

7. In view of the manifest shortcomings of plaintiffs as representatives of the class, there is a substantial likelihood that absent class members would not be bound by any judgment rendered in this case.

8. Rule 23(d)(3) requires that the court find that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Among the factors to be considered by the court are the interests of the members of the class in individually controlling the prosecution of their claims. Based upon the inadequate and nonchalant prosecution of this action by plaintiffs, it is clear that each absent class member has a paramount interest in prosecuting and controlling his own individual action.

9. Rule 23(b)(3) also requires the court to consider the difficulties likely to be encountered in the management of this case as a class action. Although the court's order certifying this case as a class action commented that common questions appeared to predominate, it did not conclude that the case would be manageable as a class action. The court has found that recovery under Rule 10-b of the Securities Exchange Act of 1934 and under Sections 11 and 12(2) of the Securities Act of 1933 will require individual proof by each class member of reliance

and compliance with the statute of limitations. In addition, defendant intends to assert and pursue available affirmative defenses which likewise will require individualized factual determinations. The necessity for these individual inquiries renders this case unmanageable as a class action.

10. Neither plaintiffs nor the absent class members will be prejudiced by the decertification of the case as a class action.

Wherefore, defendant Coopers & Lybrand respectfully requests this court to decertify this action as a class action on the grounds that plaintiffs are not adequate representatives of the class and that the case would not be manageable as a class action.

Respectfully submitted,

BRYAN, CAVE, McPHEETERS & McROBERTS
VERYL L. RIDDLE
JOHN J. HENNELLY, JR.
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Defendant Coopers & Lybrand

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

OBJECTIONS OF DEFENDANT PUNTA GORDA ISLES, INC. TO PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS

(Filed August 9, 1976)

Comes now defendant Punta Gorda Isles, Inc. and hereby makes the following objections to plaintiffs' second request for production of documents:

1. Defendant objects to the production of any documents described in request number one on the following grounds:

a. Request number one requests production of documents that are not relevant to any issue in this action, for the reason that the names and addresses of the registered owners appearing on the transfer records at any time within ninety days after May 2, 1972 will not produce the names and addresses of the class members nor evidence reasonably calculated to lead to the discovery of the names and addresses of the class members, but will merely include random names of all registered owners appearing of record during said ninety-day period.

b. The plaintiff is not entitled to have discovery from this defendant of the documents described in request number one as such documents are not in defendants' custody and cannot be obtained by plaintiff without incurring of expense, and it is plaintiffs' obligation to obtain discovery of said documents from the appropriate persons at plaintiffs' expense.

2. Defendant objects to the production of any documents described in request number two on the following grounds:

a. Request number two is broad, vague, and indefinite and does not designate any documents with sufficient particularity to enable defendant to identify such documents in order to respond to such request.

b. The plaintiff is not entitled to have discovery from this defendant of the documents described in request number one as such documents are not in defendants' custody and cannot be obtained by plaintiff without incurring of expense, and it is plaintiffs' obligation to obtain discovery of said documents from the appropriate persons at plaintiffs' expense.

PEPER, MARTIN, JENSEN, MAICHEL
and HETLAGE
By: WILLIAM A. RICHTER
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
(314) 421-3850

(Ceritficate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cecil and Dorothy Livesay,
Plaintiffs,
vs.
Punta Gorda Isles, Inc., et al.,
Defendants.
No. 73 C 517 (3)

ORDER

(Filed Sept. 1, 1976)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

It Is Hereby Ordered that the motion of the various defendants to decertify this case as a class action be and is Granted; and

It Is Further Ordered that this action be and is decertified as a class action; and

It Is Further Ordered that this matter shall proceed to trial only upon the individual claims of Cecil and Dorothy Livesay; and

It Is Further Ordered that this action shall be set for trial at a later date; and

It Is Further Ordered that all restrictions on discovery shall be lifted, and that discovery with regards to the individual claims of Cecil and Dorothy Livesay shall proceed in a normal fashion.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

[The Memorandum of the District Court filed September 1, 1976, is reproduced at pages A-1 to A-3 of the Petition for Writ of Certiorari filed by Petitioner Coopers & Lybrand in No. 76-1836.]

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cecil Livesay and Dorothy Livesay, for themselves and on behalf of all others similarly situated,
Plaintiffs,

vs.

Punta Gorda Isles, Inc.,
Wilber H. Cole,
Alfred M. Johns,
Robert J. Barbee,
Samuel A. Burchers, Jr.,
Russell C. Faber,
John Matarese,
Robert C. Wade,
Earl Drayton Farr, Jr.,
John W. Douglas, D.D.S.,
Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),
Defendants

No. 73 C 517(3)

NOTICE OF APPEAL

(Filed Sept. 29, 1976)

Notice Is Hereby Given that Cecil and Dorothy Livesay, plaintiffs above-named, for themselves and on behalf of a class of persons similarly situated, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the Order dated and entered September 1, 1976 in this action insofar as that Order granted the motion of defendants to decertify this action

as a class action, decertified this action as a class action, and ordered that the action shall proceed to trial only upon the individual claims of Cecil and Dorothy Livesay.

Attached hereto as Exhibit A are the names and addresses of the attorneys of record for each party.

Dated: New York, New York
September 28, 1976

MILBERG & WEISS
One Pennsylvania Plaza
New York, New York 10001
(212 594-5300

By MELVYN I. WEISS

SLONIM AND ROSS
111 South Meramec Avenue, Suite 506
St. Louis (Clayton) Missouri 63105
(314) 725-1060

Attorneys for Plaintiffs

[Exhibits Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Cecil Livesay and Dorothy Livesay,
Plaintiffs,
vs.
Punta Gorda Isles, Inc., et al.,
Defendants.
No. 76-1881.

JOINT MOTION OF APPELLEES TO DISMISS THE APPEAL FOR LACK OF JURISDICTION

(Filed October 1976)

Come now defendants-appellees, Punta Gorda Isles, Inc., Wilbur H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglass, and Coopers & Lybrand, pursuant to Rule 9(b) of the Rules of the United States Court of Appeals for the Eighth Circuit, and move the court to dismiss the appeal on the ground that the order appealed from is not a final decision appealable as a matter of right under 28 U.S.C. §1291.

PEPER, MARTIN, JENSEN, MAICHEL
By: WILLIAM A. RICHTER
LEWIS R. MILLS
KAREN HOLM
Attorneys for Defendant-Appellee
Punta Gorda Isles, Inc., and the
Individual Defendants-Appellees
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
(314) 421-3850

BRYAN, CAVE, McPHEETERS &
McROBERTS
By: JOHN J. HENNELLY, JR.
VERYL L. RIDDLE
Attorneys for Defendant-Appellee
Coopers & Lybrand
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600

(Certificate of service omitted in printing)

[The opinion, judgment and denial of rehearing entered by the Court of Appeals are reproduced at pages A-3 to A-. . in the Petition for Writ of Certiorari filed by Petitioner Coopers & Lybrand in No. 76-1836.]

MILBERG & WEISS
Counsellors at Law
One Pennsylvania Plaza
New York, N. Y. 10001
(212) 594-5300

March 23, 1976

Honorable H. Kenneth Wangelin
United States District Judge
Eastern and Western Districts of Missouri
315 U.S. Court House & Custom House
St. Louis, Missouri 63101

Re: Civil Livesay, et us. v. Punta Gorda Isles, Inc., et al., Case No. 73 C. 517 (3)

Dear Judge Wangelin:

In response to your letter of March 2, 1976 requesting "objection, comments or suggestions" concerning the proposed "Notice of Pendency of Class Action."

We have no comment with respect to paragraphs 1, 2, 3, 4, 5 and 6 of the proposed Notice.

It is our opinion that paragraph 7 should at least inform the members of the class that this Court has determined that the issue of liability has been certified for class treatment. If we set forth no issues upon which this action has been certified for class treatment, we are in effect requesting joinder in a class which may not be binding on any of the issues to be litigated. Such an approach would not give the defendants the protection they are entitled to, to wit, a binding effect resulting from a determination of that issue with respect to those members of the class who do not opt out. We therefore recommend with respect to paragraph 7, the following language:

"The court has certified this action to proceed as a class action at least with respect to the issue of defendants' liability arising out of the issuance of the Punta Gorda Isles, Inc. Registration Statement and Prospectus dated May 2, 1972."

"The court has reserved decision as to whether or not with respect to other particular issues this action may be similarly maintained as a class action and will decide such questions only after the last day on which class members may exclude themselves from the class action. With respect to other issues, if determined to be appropriate for class treatment, the determination of those issues will be binding upon members of the class. In the event such issues are not determined to be appropriate for class treatment, those issues will not be decided in a manner binding upon members of the class, but will instead be treated as individual issues for determination."

With respect to paragraph 8, we suggest the addition of the following language. Following the information contained in the parenthesis in the middle of the paragraph:

> "Thereafter, plaintiffs retained new counsel who are unrelated to their original counsel."

While we see no need for the court to invite class members to petition for their appointment as "new class representatives," we understand that the court has expressed a previous desire to insert such language and rest upon our previously stated position with respect to that issue.

With respect to paragraph 10, we would like to add the word "new" after the word "their", and additionally add the name and address of Slonim & Ross, legal counsel, so that the last sentence will read:

> "You will be represented by the named plaintiffs in this action and their new counsel, Milberg & Weiss, One Penn-

sylvania Plaza, New York, New York 10001, and Slonim & Ross, 111 South Meramec Avenue, Meramec Building, Clayton, Missouri 63105."

With respect to paragraph 11, we know of no precedent for the language ". . . and you may ask the court to substitute you and your counsel for you as class representatives." We believe that such language may impede the progress of the litigation and invite many people to second guess each procedural step undertaken in the course of a complex litigation. The intervention and joinder language is a traditional manner of handling these rights and the court has amply provided for notice of such rights in this and other paragraphs of the Notice.

We have no objection to paragraph 12.

We do object to the inclusion in paragraph 13 "and any other communications commenting upon the conduct of this action." We feel it is improper to have members of the class communicate what would be normally privileged under the attorney-client privilege, to persons other than their attorneys. The Multi District Manual while under certain circumstances prohibits the attorney representing the class representatives from initiating contact with the members of the class, does not preclude communication with members of the class when initiated by the members of the class.

We hope that the above is useful and we appreciate your Honor's efforts in this matter.

Respectfully,

/s/ MELVYN I. WEISS

pc

cc: Mr. Richard Ross
Messrs. Veryl L. Riddle and
Charles G. Siebert
Mr. Walliam A. Richter

PEPER, MARTIN, JENSEN, MAICHEL and HETLAGE
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April 21, 1976

Melvyn I. Weiss, Esquire
Milberg & Weiss
One Pennsylvania Plaza
New York, New York 10001

Re: Livesay vs. Punta Gorda Isles, Inc., et al.

Dear Mel:

In our telephone conversation of April 20 you requested us to furnish you a list of the initial record holders of the Punta Gorda stock and debentures sold pursuant to the May 2, 1972 registration statement. You also advised that you intend to give the notice to the initial record holders.

The Court has directed the plaintiffs to issue the notice to "all potential members of the class," as is required by **Eisen** IV. The members of the class are of course all persons who purchased the common stock or debentures at the offering pursuant to the registration statement. Issuing the notice only to the initial record holders would not satisfy the requirement that the plaintiff issue the notice to **all** potential members of the class, because those purchasers who held their securities in street name would not receive that notice. Moreover, many of the initial **registered** holders may have purchased their securities after the offering. A notice only to the initial registered holders would, therefore, have the dual defects of failing to give notice to many members of the class while giving notice to non-members of the class.

The plaintiffs must give notice to **all** the class members as required by the court and by the rule in **Eisen.** They cannot give a notice which is not reasonably calculated to reach all the members of the class, and which is directed to non-members of the class.

We do not know the names or addresses of the purchasers of the stock and debentures at the offering. The only information we have concerning transfer or registration is a list of the names of the first registered holders of the stock after the underwriters. Such information does not include addresses as we advised Mr. Feuerstein in our letter of Aug[illegible], 1975. In any event, the first holders of record after the [illegible]derwriters would include many non-class members and omit many class members. Thus a list of the first holders of record after the underwriters would be of no assistance in connection with giving the requisite notice to the class members.

In short, we do not have the information which the plaintiffs need to send the notice to all the class members.

Sincerely,
/s/ WILLIAM A. RICHTER

WAR eh

cc: Veryl Riddle

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, JR., RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,

Petitioners,

against

CECIL LIVESAY and DOROTHY LIVESAY, for Themselves and on Behalf of all Others Similarly Situated,

Respondents.

COOPERS & LYBRAND,

Petitioner,

against

CECIL LIVESAY and DOROTHY LIVESAY, for Themselves and on Behalf of all Others Similarly Situated,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI To the United States Court of Appeals for the Eighth Circuit

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This brief is submitted in opposition to two related petitions for Writs of Certiorari* which seek review of a

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* Respondents received the Petitions for Writs of Certiorari on June 24, 1977.

judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on March 4, 1977, as to which rehearing was denied on March 28, 1977. In its decision, the Court of Appeals ruled that the United States District Court for the Eastern District of Missouri abused its discretion in decertifying the class herein for alleged delay by plaintiffs in prosecuting the litigation when no basis existed for a finding of wrongful delay by plaintiffs, when "much of the delay in this case is directly attributable to defendants," and when the District Court had itself taken action which did not advance the progress of the litigation. *Livesay* v. *Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1110-1112 (8th Cir. 1977) (11a-16a).*

The Court of Appeals based its jurisdiction to hear the appeal on the "death knell doctrine" under which an immediate appeal lies from an order denying class certification under 28 U.S.C. § 1291 when the record shows that the litigation will not proceed absent reversal of such order. As shown below, the Eighth Circuit's decision is fully consistent with the decisions of the various circuits which have expressly adopted the "death knell" doctrine, and the record would also support appellate jurisdiction in the two circuits which have rejected the "death knell doctrine". The present petitions are simply a further attempt by defendants to continue the tactics of delay for which they were criticized by the Court of Appeals.

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* The District Court opinion below is not yet officially reported, and is set forth as Appendix A to this brief (pages 1a to 2a). The Eighth Circuit March 4, 1977 opinion is reported at 550 F.2d 1106 and is set forth as Appendix B to this brief (pages 3a to 16a).

Questions Presented

(a) With Respect To All Petitioners

Does an appeal lie under 28 U.S.C. § 1291 from a judgment decertifying a class where the record provides substantial basis for the Circuit Court's conclusion that the action would not proceed absent reinstatement of the plaintiffs as class representatives and the District Judge had stated at the evidentiary hearing on class certification that an immediate appeal from denial of class certification would be appropriate?

(b) With Respect To Petitioner Coopers & Lybrand

Did the Court of Appeals exceed its authority in ruling that the District Court had abused its discretion in decertifying the class for delay in prosecuting the litigation when the delays in the litigation were actually caused by defendants and by the District Court?

Statutes and Rules Involved

The issues presented involve 28 U.S.C. §§ 1291 and 1292(b), and Rule 23 of the Federal Rules of Civil Procedure, the texts of which appear in Appendix C hereto.

Statement of the Case

In July 1973, plaintiffs (the respondents herein) commenced this class action for damages resulting from purchases of securities issued by defendant-petitioner Punta Gorda Isles, Inc. ("Punta Gorda"), a Florida land development company, pursuant to a Registration Statement and Prospectus dated May 2, 1972. The first amended complaint alleges that defendants violated various sections of

the federal securities laws including Sections 11 and 12 (2) of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(2).

In April 1974, plaintiffs moved for an order determining that the action proceed as a class action. Shortly thereafter, defendants took plaintiffs' depositions on all issues relating to the pending action, including extensive questioning concerning plaintiffs' financial resources, anticipated expenses of the litigation, and plaintiffs' intention to continue the litigation if class certification were denied. *E.g.*, App. 29a-30a; 51a-52a; 105a-108a.* Immediately upon conclusion of such depositions defendant-petitioner Coopers & Lybrand ("Coopers") moved to stay all discovery other than discovery relating to the class action determination, and Coopers' motion was granted on May 13, 1974.

The class motion was argued on June 24, 1974. During the autumn of 1974, the District Court denied a motion by plaintiffs to lift the stay on substantive discovery but did not decide the class action motion. Consequently, plaintiffs petitioned for a writ of mandamus on November 1, 1974 requesting the Eighth Circuit to order the District Court to lift its stay on discovery. On November 15, 1974, the Eighth Circuit Court of Appeals denied the petition for a writ of mandamus, but directed that:

> "Petitioner should request a prompt ruling on its motion of April 9, 1974 for an order determining that a class action existed. If an evidentiary hearing is desired, that likewise can be requested. The trial court should then promptly rule on petitioner's motion and remove its stay order and thereafter permit discovery to proceed on the merits. . . ." (App. 175a-176a)

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* "App." references are references to pages of the Joint Appendix on the Appeal.

As a result of the Eighth Circuit's order, an evidentiary hearing on the class motion was held on December 30, 1974. At that hearing evidence was presented to the District Court concerning the extent of plaintiffs' loss (approximately $2,650), plaintiffs' financial position, anticipated litigation expenses, plaintiffs' intention to pursue the litigation if class status were denied, and the extent to which any other potential class members had manifested an interest in the litigation. *E.g.*, App. 192a, 209a-210a, 213a-226a, 244a-245a, 272a-274a, 295a-296a. At the conclusion of the evidentiary hearing, District Judge Wangelin stated that an immediate appeal would be appropriate if he refused to certify the class:

> "I'm sure you've all heard of the quote Dealth Knell Doctrine, and assuming, without deciding, that I rule against a class action, I think the record should be in such shape that plaintiffs could 1291 it, and go up to the Eighth Circuit and get an opinion . . ." (App. 313a).

On June 19, 1975, Judge Wangelin certified the class, and on July 25, 1975, plaintiffs moved to dissolve the stay on substantive discovery pursuant to the prior direction of the Eighth Circuit. Defendants opposed such motion and moved for reconsideration of class status. On October 23, 1975, the District Court denied plaintiffs' motion to lift the stay on substantive discovery, lifted the stay on discovery solely to allow discovery of names and addresses of class members, agreed with defendants that questions had been raised concerning the adequacy of plaintiffs as class representatives because plaintiffs had not joined

Punta Gorda's underwriters as defendants,* and ordered submission of proposed forms of notice of pendency of class action.

Proposed notices of pendency were submitted to Judge Wangelin in November 1975, and Judge Wangelin mailed to counsel his proposed notice of pendency on March 1, 1976. Further comments upon the proposed notice were submitted by plaintiffs and defendants, and on April 9, 1976, the District Court mailed to all counsel the final form of notice of pendency. On receiving such form, plaintiffs requested from Punta Gorda the names and addresses of record owners of Punta Gorda securities for a period deemed relevant by plaintiffs so that plaintiffs could provide notice of the class action to such owners. Punta Gorda refused to provide such information, and motion practice ensued concerning plaintiffs' request for such information and the differing positions taken by the parties concerning the proper method of providing notice to the class. While such motion practice was occurring, defendants moved to decertify the class on various grounds, including their claim that plaintiffs had unduly delayed in prosecuting the litigation.

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* New counsel had appeared for plaintiffs on June 30, 1975 in response to a ruling by the District Court on June 19, 1975 that plaintiffs' original counsel had a conflict of interest in his continuing relationship with Punta Gorda's underwriters. In an affidavit sworn to September 4, 1975 and in supplementary information provided at a pre-trial conference on November 4, 1975, plaintiffs' new counsel advised Judge Wangelin of their intention not to sue the underwriters. Such decision was required because claims against the underwriters had been barred by the statutes of limitations even prior to new counsel's appearance. Plaintiffs' new counsel had also determined that the joining of underwriters was unnecessary because the existing defendants have ample resources to pay any judgment and any underwriters' liability was at best secondary. Coopers' accusation on pages 9-10 of its petition that plaintiffs or their present counsel "suppressed" conflict of interest problems of plaintiffs' first attorney is wholly without foundation and is intended to divert this Court from the issue which expressly gave rise to the decertification—*i.e.*, the question of undue delay in the litigation.

The District Court granted the motion for decertification on September 1, 1976, and only then did the District Court release its stay on substantive discovery. See 1a-2a. As the Court of Appeals held, the District Court expressly based its decision "solely on the finding that plaintiffs were not adequate class representatives because they had inordinately delayed in prosecuting the litigation. . . ." 550 F.2d at 1110; 11a.

On appeal, the Eighth Circuit reversed, holding that the District Court's finding that plaintiffs were inadequate class representatives was so erroneous as to constitute an abuse of discretion. The Court of Appeals addressed itself carefully to defendants' and the District Court's bases for attributing undue delay to plaintiffs and found that undue delay by plaintiffs had not been shown. 550 F.2d at 1111-12; 11a-14a. The Circuit Court agreed that undue delay had occurred, but found that such delay was in large part caused by defendants and was also attributable to the District Court:*

> "That there has been undue delay in this lawsuit is beyond question. From examination of the entire record of this protracted proceeding, however, it becomes quite clear that much of the delay in this case is directly attributable to defendants. For example, defendants had been granted 14 extensions of time, totalling approximately 190 days, in which to file pleadings, motions and other papers. In addi-

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* An example of defendants' delaying tactics noted by the Eighth Circuit was Punta Gorda's objecting to plaintiffs' request for disclosure of the names and addresses of registered owners of Punta Gorda securities on the ground that such information was not in Punta Gorda's possession. Since this information was in the possession of Punta Gorda's transfer agent, which agent would be required to release such information at Punta Gorda's direction, the Court of Appeals properly described this objection by Punta Gorda to be "little else than a delaying tactic". (550 F.2d at 1112, ftn. 9; 14a)

tion, defendants have filed motions to reconsider or modify earlier court orders, which motions have consistently alleged grounds previously ruled upon by the court. The clear import of this course of conduct is to make this lawsuit as time-consuming and costly as possible.

In addition, the district court has on some occasions taken action which did not advance the progress of this litigation. The court took approximately five months to decide the class action certification motion after the evidentiary hearing was held. The court took approximately four months to approve the form of notice to the class members. These delays appear to have been justifiable due to the complex nature of the questions presented. However, during this time there was a stay of substantive discovery in effect. The practical effect of this stay was to prevent the parties from concurrently proceeding to the merits while the court considered the various procedural questions. In these circumstances, virtually all the plaintiffs could do to advance the course of this litigation was to attempt to lift the stay on discovery. Plaintiffs twice sought to lift this stay and were twice unsuccessful.

> We conclude that the district court order decertifying the action as a class action because of plaintiffs' failure to prosecute is wholly unsupported by the record, and we accordingly reverse. We do not disturb that portion of the order which lifted the stay on substantive discovery." (550 F.2d at 1112; 14a-15a)

The Court of Appeals held that it had jurisdiction to review the decertification under 28 U.S.C. § 1291 because

the denial of class certification sounded the "death knell" of the action. Such determination was based not merely on the fact that plaintiffs' individual claim for damages totals only approximately $2,650.00, but on a review of the extensive material in the record which demonstrated that it would be economically senseless for plaintiffs to proceed with the litigation on an individual basis.* Thus the Court of Appeals noted that

> "Plaintiffs, both of whom are employed, have an aggregate yearly gross income of $26,000. Their total net worth is approximately $75,000, but only $4,000 of this sum is in cash. The remainder consists of equity in their home and investments.
>
> As of December 1974 plaintiffs had already incurred expenses in excess of $1,200 in connection with this lawsuit. Plaintiffs' new counsel has estimated expenses of this lawsuit to be $15,000. The nature of this case will require extensive discovery, much of which must take place in Florida, where most defendants reside. Moreover, the allegations regarding the prospectus and financial statements will likely require expert testimony at trial.
>
> After considering all the relevant information in the record, we are convinced that plaintiffs have sustained their burden of showing that they will not pursue their individual claim if the decertification order stands. Although plaintiffs' total net worth could absorb the cost of this litigation, 'it [takes]

* As described above, such material includes deposition testimony of plaintiffs and testimony of plaintiffs and their former attorney before the District Court at the evidentiary hearing on the class motion. Such information was further supplemented by plaintiffs' present counsel's estimate of litigation expenses as presented to the District Court in September 1975.

> no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less.' Douglas, Protective Committees in Railroad Reorganization, 47 Harv.L.Rev. 565, 567 (1934). We conclude we have jurisdiction to hear the appeal." (550 F.2d at 1109-10; 9a-10a) (footnote references omitted)

The Circuit Court recognized that "Plaintiffs who seek to invoke the 'death knell' doctrine have the burden of developing, in the trial court, an adequate factual record upon which an appellate court may determine whether the action will proceed absent class certification," and stated that the "preferable way to do this in a post-ruling hearing where the district court has an opportunity to enter appropriate findings of fact." The Eighth Circuit noted however that such a hearing is not necessarily required in all cases, and held that "In the instant case, the record of the entire proceeding contains sufficient facts to allow us to make an informed judgment on the matter." (550 F.2d at 1110, ftn. 5; 10a)

The Circuit Court also dealt expressly with defendants' argument that the "death knell" doctrine should not apply because the record revealed other class members having substantial individual claims. The Eighth Circuit rejected such a characterization of the record, stating that:

> ". . . the record reveals only that certain class members had indicated a willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' new counsel." (550 F.2d at 1109, ftn. 2; 8a-9a)*

* Testimony at the evidentiary hearing on class certification with respect to this question was supplemented by statements of record to the Circuit Court by counsel for plaintiffs.

In consequence, the Circuit Court reversed the order decertifying the class and remanded for further proceedings consistent with its opinion. The Circuit Court denied defendants' motions to stay its mandate pending preparation of petitions to this Court for issuance of writs of certiorari, and the Eighth Circuit's mandate issued on April 13, 1977.

REASONS FOR DENYING THE WRIT

I

On The Record Below, Allowance Of An Immediate Appeal From The Decertification Order Was Proper Under The Standards Employed For Such Appeals In All Circuits.

There would seem to be little basis for disagreement with the proposition that if in fact a denial of class certification effectively terminates a litigation, the denial of class certification is a final decision and an immediate appeal is appropriate under 28 U.S.C. § 1291. Recognition that the practical consequence of a denial of class status can be the termination of the entire litigation has led a number of circuits to adopt the "death knell" doctrine under which denial of class certification is immediately appealable when it results in the termination of the litigation. *E.g., Domaco Venture Capital Fund* v. *Teltronics Services, Inc.*, 551 F. 2d 508, 509 (2nd Cir. 1977); *Hooley* v. *Red Carpet Corp. of America*, 549 F.2d 643 (9th Cir. 1977); *Ott* v. *Speedwriting Pub. Co.*, 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams* v. *Mumford*, 511 F.2d 363, 366-67 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); *Graci* v. *United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Eisen* v. *Carlisle & Jacquelin* (*Eisen I*), 370 F.2d 119, 120-21 (2nd Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

While two circuits have refused to adopt the "death knell" doctrine, they have recognized the need for a mechanism by which a determination can be made as to whether or not a denial of class certification is sufficiently critical to the action to justify an immediate appeal by holding that the right to an immediate appeal from a denial of class certification should be determined in the first instance by the District Court pursuant to a motion for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). *E.g.*, *Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364, 1366-69 (7th Cir.), *cert. denied*, 87 Sup. Ct. 272 (1976); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 752-53 (3rd Cir.), *cert. denied*, 419 U.S. 885 (1974).

Plaintiffs submit that an immediate appeal herein was appropriate under the standards employed in all circuits.

Defendants argue that the result below is inconsistent with the ruling of the Fifth Circuit in *Gosa* v. *Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971), because subsequent to the decertification order plaintiffs did not seek an evidentiary hearing at which the District Court would rule as to whether or not the denial of class certification effectively terminated the action. Unlike the situation in *Gosa*, however, where the record contained absolutely no development of relevant facts such as anticipated litigation expenses and the financial condition of the plaintiff (see 449 F.2d at 1332), the record herein contains such information in detail. Thus, the Eighth Circuit explicitly adverted to the *Gosa* ruling, but found that the record contained ample evidence to support its conclusion that the action would not continue absent an immediate appeal. (550 F.2d at 1110, ftn. 5; 10a). As shown above in the Statement of the Case (page 5), the Circuit Court's ruling is consistent with the District Court's statement at the conclusion of the evidentiary hearing on the class

motion that an immediate appeal from a denial of class certification would be appropriate under the "death knell" doctrine.

Defendants also argue that the decision of the Eighth Circuit below is inconsistent with the decision of the Ninth Circuit Court of Appeals in *Hooley* v. *Red Carpet Corp. of America, supra,* because the Eighth Circuit refused to rule that certain statements by plaintiffs' former counsel at the evidentiary hearing on the class action concerning the existence of other purported class members who had allegedly evinced some interest in paying some costs of the action rendered this appeal premature. However, the Eighth Circuit addressed itself directly to such contentions and found on the basis of a review of the record only a prior "tangential involvement" of certain class members who "had indicated a willingness to pay part of the expenses of suit," which tangential involvement "ceased after the appearance of plaintiffs' new counsel." (550 F.2d at 1109, ftn. 2; 9a) Consequently the Eighth Circuit decision below would have been justified under the approach of the Ninth Circuit as stated in *Hooley.**

Moreover, the District Court's statement at the close of the evidentiary hearing on the class motion that an immediate appeal would be proper and desirable in the event the District Court denied class certification shows that the appeal would also be proper under the approach adopted in the Third and Seventh Circuits which provides for appeals from denial of class certification pursuant to certification by the District Judge under 28 U.S.C. § 1292(b).

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* While in one portion of the *Hooley* opinion the Ninth Circuit spoke of requiring plaintiff to show the lack of a viable claim on the part of any class member, such language was modified by other statements in *Hooley* indicating that the real concern was the likelihood that other class members would in fact pursue the action themselves. See 549 F.2d at 646.

While Judge Wangelin's statement refers to the death knell doctrine and to an appeal under Section 1291, his strong expression of support for an immediate appeal in the event that he denied class certification satisfies the requirement in the Third and Seventh Circuits that the appropriateness of an immediate appeal be determined initially by the District Court.*

II

The "Death Knell" Doctrine As Interpreted By The Court Of Appeals For The Eighth Circuit Is Fully Consistent With The "Final Decision" Rule Of 28 U.S.C. Section 1291.

Contrary to defendants' arguments, the Eighth Circuit's decision does not conflict with the federal policy of allowing appeals from final decisions as set forth in 28 U.S.C. § 1291 and involves no misallocation of manpower or judicial functions. Certainly if the litigation is in fact at an end absent a reversal of the decertification, the time is ripe for an appeal. The Eighth Circuit based its decision as to appealability on ample evidence of record showing that the action would not go forward if the District Court's order remained unchanged, and as shown above, the District Court itself had expressed its approval of an immediate appeal from a denial of class status.

Petitioners make the further argument that the death knell doctrine is unduly favorable to class action plaintiffs

* In light of the District Court's statements concerning the appropriateness of an immediate appeal, the Eighth Circuit could also have taken jurisdiction under *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154 (1964) where this Court declared that a Court of Appeals may hear an appeal in a "marginal case" where the questions presented are "fundamental to the further conduct of the case" and where "if the District Judge had certified the case to the Court of Appeals under 28 U.S.C. § 1292(b) (1958 ed.), the appeal unquestionably wou'd have been proper. . . ."

because appeals are available to plaintiffs from class certification denials but not to defendants from orders granting class status. However, under 28 U.S.C. § 1291, the issue must be whether or not a denial of class certification does in fact bring about the termination of the litigation. If it does, an appeal must be allowed under 28 U.S.C. § 1291 regardless of the appealability of orders granting class certification. Plaintiffs submit that so long as a proper finding is made that the denial of class certification terminates the litigation, Courts of Appeal have no alternative but to allow an appeal under 28 U.S.C. § 1291.

As shown above, this appeal would have been proper under the Ninth Circuit approach as set forth in *Hooley* v. *Red Carpet Corp. of America, supra.* Plaintiffs also submit, however, that any definition of finality in class actions under which the litigation is deemed to continue after decertification unless plaintiffs affirmatively show that no other class members have viable claims would place an unreasonable burden on plaintiffs and would also be inconsistent with the purposes behind Rule 23 of the Federal Rules of Civil Procedure. Such an interpretation would encourage the very proliferation of litigation Rule 23 seeks to avoid. Moreover, under Rule 23(c)(2), nonparty class members are entitled to remain passive and allow the class representatives to protect their interests during the pendency of the class action. Denial of the right to an immediate appeal from a decertification absent proof that other class members with viable claims are unlikely to intervene is inconsistent with such policy, because such denial would require a class member who prefers to remain passive to intervene or commence his own litigation in order to protect his position.*

* Requiring class representatives to affirmatively show that no class member with a viable claim will intervene may also raise ethical problems, since communications of counsel for plaintiffs with absent class members aimed at determining whether potential intervenors exist may be misinterpreted as efforts to solicit litigation.

Such inconsistency would be especially striking in the present case, where special statutes of limitations problems would have placed considerable pressure on other class members to intervene, if contrary to the record herein, potential intervenors were in existence. The claims herein under Section 11 and 12(2) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77k, 77l(2), are subject to a limitations period of one year from the date upon which discovery of misleading statements and omissions "should have been made in the exercise of reasonable diligence" and to an absolute three-year limitation. Section 13 of the 1933 Act (15 U.S.C. § 77m). Plaintiffs were actively investigating a lawsuit against the defendants herein in May-June 1973, and the lawsuit was commenced in July 1973. While the statute of limitations was tolled by commencement of the class action (see, *e.g., American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974)), the decertification created a situation in which absent class members might have been threatened with loss of their claims if they did not intervene or commence their own suits prior to appellate review of the decertification.*

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* In their appellate brief, plaintiffs presented as an alternative ground for jurisdiction the "collateral order doctrine," under which appellate jurisdiction exists pursuant to 28 U.S.C. § 1291 to review orders which finally determine claims separable from the merits which are too important to be denied review and too independent of the cause to be deferred until the entire case is adjudicated. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Plaintiffs submit that in light of the special statute of limitations problem which was created for absent class members by the decertification and in the light of the policy of Rule 23 to allow absent class members to remain passive until proof of claim forms are to be filed, the "collateral order doctrine" would have been an alternative basis for appellate jurisdiction herein. See also, Rosenn, J., dissenting in *Hackett* v. *General Host Corp.*, 455 F.2d 618, 627 *et seq.* (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972).

III

The Court Of Appeals Did Not Exceed Its Proper Authority In Holding That Decertification For Alleged Undue Delay By Plaintiffs Was An Abuse Of The District Court's Discretion.

In addition to requesting this Court to grant a Writ of Certiorari to review the Eighth Circuit's acceptance of appellate jurisdiction, petitioner Coopers has requested that the writ also issue in order to determine whether the Eighth Circuit exceeded its powers in ruling that the District Court's decertification was an abuse of discretion. Unlike the case of *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 45 U.S.L.W. 4524 (May 31, 1977) upon which Coopers relies, the Court of Appeals below did not certify a class in the first instance.* The Eighth Circuit merely held that the District Court could not, after certifying a class, strip the plaintiffs of their status as class representatives on the ground of undue delay in prosecuting the litigation when the record was clear that the plaintiffs had not caused undue delay, that the defendants themselves were responsible for undue delay, and that the District Court had also contributed significantly to delay. (550 F. 2d at 1110-12; 11a-16a)

Numerous decisions recognize that, while a District Court has great latitude in deciding whether an action is maintainable as a class action, the Courts of Appeals may review such decisions for failure to properly apply legal criteria and for abuses of discretion. *E.g., Shumate & Co.* v. *Nat'l Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 155 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); *Wetzel* v.

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* Moreover, in *East Texas Motor Freight System, Inc.*, this Court expressly stated that it was not holding that a Court of Appeals could not certify a class in the first instance, but only that the Court of Appeals had erred because the record was clear that plaintiffs in that action were not proper class representatives. Slip Opinion, p. 7.

Liberty Mutual Ins. Co., 508 F.2d 239, 245 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2nd Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

Respondents submit that the Eighth Circuit's ruling did not exeed its lawful powers but simply reversed clear error by the District Court—an essential function of the appellate system. The Court of Appeals has in no way questioned or limited the District Court's continuing power to determine whether or not the action should be maintained as a class action. The Eighth Circuit has only ruled that the District Court's express grounds for decertification have no basis in the record and that in consequence the decertification order was improper.

Coopers' real reason for seeking a Writ of Certiorari with respect to the merits of the decision below is reflected in Coopers' concern stated on page 10 of its petition that, as a result of the Eighth Circuit's decision, discovery on the merits in this litigation has at long last begun. Consistent with defendants' past practice as recognized in the Eighth Circuit's opinion (550 F.2d at 1112; 14a-15a), Coopers continues to seek new fields for litigating the question of class certification so as to find a basis for continuing to delay the substantive progress of this law suit.

The Eighth Circuit's decision was simply a classic example of a Court of Appeals carrying out its function of correcting clear error by the District Court. Consequently, no basis whatsoever exists for issuance of a Writ of Certiorari for review of the Eighth Circuit's decision on the merits.

Conclusion

On the record below, appellate jurisdiction would have been proper in any of the circuits which have dealt with the question of the appealability of denials of class certification, and the Eighth Circuit's decision was in full compliance with the "final decision" rule of Section 1291. The Court of Appeals did not exceed its authority in reversing the District Court's decertification order as an abuse of discretion. Accordingly, the petitions for Writs of Certiorari should be denied.

Dated: New York, New York
July 22, 1977

Respectively submitted,

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JEROME M. CONGRESS

APPENDIX A

In the United States District Court for the
Eastern District of Missouri
Eastern Division
No. 73 C 517 (3)

—o—

Cecil and Dorothy Livesay,

Plaintiffs,

v.

Punta Gorda Isles, Inc., *et al.*,

Defendants.

—o—

Memorandum
(Filed September 1, 1976)

This matter is before the Court upon the motion of the various defendants to decertify this lawsuit as a class action.

The basis of the various defendants' motion is that the plaintiffs, as class representatives, are failing to prosecute this action, and are therefore denying the defendants a right to a speedy adjudication of the claims against them.

In order to deal with the defendants' motion, a brief chronology of events is required. This lawsuit was originally filed on July 27, 1973. Plantiffs' original counsel did not seek a class action hearing until April 9, 1974. On June 19, 1975, this Court, in a Memorandum and Order, declared that the action should proceed as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The delay between the class action hearing, and this Court's certification was due to the substituton of new counsel for plaintiffs. On October 23, 1975, this Court partially dis-

solved its stay order regarding discovery, and allowed discovery to proceed as to the names and addresses of the members of the class so that the appropriate class action notice could be sent. The plaintiffs did not institute discovery to determine the names and addresses of the absent class members until July 20, 1976.

It is the opinion of the Court that the plaintiffs have failed to offer adequate excuses for their delay in prosecuting this action as a class action. In response to the motion of the defendants, the plaintiffs have alleged that it is anomalous for the defendants to attempt to protect the interests of the members of the class. The Court agrees that such concern on the part of the defendants involve tears of the crocodilian variety, however, the plaintiffs misjudged the true thrust of the defendants' motion. The defendants are merely seeking, as is their right, to have a speedy adjudication of the claims against them. Since this lawsuit has been pending for approximately three years, and class action notices have not gone out more than a year after the action was certified as a class action, the Court is forced to the conclusion that there has been a lack of prosecution on the part of the plaintiffs as class representatives.

Since the plaintiffs seem to have no desire to prosecute this matter as a class action, the Court will decertify this matter as a class action, and the lawsuit shall proceed on the indvidual claims of Cecil and Dorothy Livesay as stated in the accompanying Order.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 76-1881

0

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellants,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

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No. 76-1906

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,

Petitioners,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton

Appendix B

Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),

and

Honorable H. Kenneth Wangelin, United States District Judge,

Respondents.

—0—

Petition for Writ of Mandamus

Submitted: January 13, 1977

Filed: March 4, 1977

Before HEANEY and STEPHENSON, *Circuit Judges*, and STUART,* *District Judge*.

STEPHENSON, *Circuit Judge*.

In these consolidated cases, Cecil and Dorothy Livesay (plaintiffs) seek review of the district court's order decertifying their action as a class action. In No. 76-1881, plaintiffs appeal from that order. In No. 76-1906, plaintiffs seek a writ of mandamus compelling the district court to vacate its decertification order.

On July 27, 1973, plaintiffs filed a complaint seeking approximately $2650 in individual damages resulting from their purchase of $5000 worth of debentures and 100 shares of common stock issued by Punta Gorda Isles, Inc. (Punta Gorda), a Florida land development corporation, pursuant to a registration statement and prospectus dated May 2, 1972. The essence of plaintiffs' claim was that the prospectus and registration statement contained materially mis-

* The Honorable William C. Stuart, United States District Judge for the Southern District of Iowa, sitting by designation.

Appendix B

leading statements and omissions.[1] The named defendants were Punta Gorda, certain individuals who were officers and directors of Punta Gorda, and the accounting firm of Coopers & Lybrand (Coopers), which had certified the financial statements in the registration statement and prospectus. Plaintiffs sought to represent a class of approximimately 1,800 persons who had purchased securities at the May 2, 1972, public offering.

On April 9, 1974, plaintiffs moved pursuant to Fed. R. Civ. P. 23 to have the action certified as a class action. On May 13, 1974, the district court granted Coopers' motion for a stay of all discovery except discovery relating to the class action determination. On June 24, 1974, oral argument on the class action certification motion was held. On July 16, 1974, the district court denied Coopers' motion to strike the class action allegations in the complaint, but did not at that time certify the class. On September 23, 1974, the district court denied plaintiffs' motion to lift the stay on substantive discovery.

On November 1, 1974, plaintiffs filed a petition for a writ of mandamus in this court, requesting that the district court be ordered to lift the stay on substantive discovery. This court denied the petition by order dated November 15, 1974, but expressed the view that plaintiffs should request a prompt ruling on their motion for class action certifica-

[1] Essentially, the complaint alleges: (1) a failure to disclose that new accounting rules of the American Institute of Certified Public Accountants would require an adverse restatement of earnings for 1967-1972; (2) a failure to disclose that the earnings consisted of installment sale contracts where cash would not be received until future dates; (3) a misleading statement of the ratio earnings to fixed charges because not based on actual cash flow; and (4) a failure to disclose that certain Florida ecological regulations would seriously impede Punta Gorda from developing artificial waterfront property.

tion and that the district court should promptly rule on the motion and thereafter permit discovery on the merits. *Livesay* v. *Punta Gorda Isles, Inc.*, No. 74-1827 (8th Cir., November 15, 1974).

On December 30, 1974, an evidentiary hearing on the class action certification motion was held in the district court. On June 19, 1975, the district court entered an order certifying the action as a Rule 23(b)(3) class action, which order expressly found plaintiffs to be adequate class representatives. The order also held that plaintiffs' counsel had a conflict of interest because he had represented one of the underwriters of the Punta Gorda offering on unrelated matters. The order deemed this conflict serious because none of the underwriters had been joined as defendants in the plaintiffs' suit. Plaintiffs' counsel withdrew, and on June 30, 1975, plaintiffs' current counsel entered its appearance.

On July 25, 1975, plaintiffs moved to dissolve the stay on substantive discovery. Coopers opposed the motion and sought a reconsideration of the order certifying the action as a class action. On October 23, 1975, the district court denied plaintiffs' motion to dissolve the stay. In its order, the district court expressed concern about the adequacy of plaintiffs as class representatives, based largely on plaintiffs' failure to join any underwriters as defendants. The court did not, however, decertify the class action at that time, because it believed that such decertification might jeopardize the claims of absent class members. The court directed the parties to prepare forms of notice of the pendency of the class action to be mailed to the class members and also lifted the stay on discovery to the extent that

plaintiffs could seek the names and addresses of the class members. The parties submitted proposed forms of notice in November 1975.

On March 1, 1976, the district court mailed to the parties its proposed form of notice. Both parties submitted suggested changes, and on April 9, 1976, the district court mailed to the parties the final form of notice.

On April 20, 1976, plaintiffs' counsel telephoned counsel for Punta Gorda and requested the names and addresses of the initial registered owners (after the underwriters) of the debentures and common stock sold pursuant to the May 2, 1972, registration statement. By letter dated April 21, 1976, Punta Gorda's counsel declined to furnish that information.

On July 9, 1976, plaintiffs requested the district court to conduct a conference for the purpose of discussing the issues involved in discovery of the names of class members. On July 20, 1976, plaintiffs served defendants with a motion to produce the names and addresses of the initial registered owners of the stock and debentures. On July 23, 1976, Coopers filed a motion to decertify the action as a class action. On July 26, 1976, the conference requested by plaintiffs was held at which the district court ordered the parties to submit briefs, etc. in support of the various pending motions.

On September 1, 1976, the district court issued a memorandum and order decertifying the class action. The court found that plaintiffs had inordinately delayed in prosecuting the case and were thus not adequate class representatives. The order also lifted the stay on substantive discovery. Subsequently, both parties have engaged in some discovery on the merits. Plaintiffs now seek review of the September 1 decertification order by direct appeal (No.

76-1881) and by a petition for a writ of mandamus (No. 76-1906).

We are confronted with the threshold issue of our jurisdiction to hear an appeal from the district court's order decertifying the lawsuit as a class action. Defendants allege that the order is not a final order which is appealable under 28 U.S.C. § 1291. We disagree.

Orders denying class action certification are reviewable under 28 U.S.C. § 1291 if they sound the "death knell" of the action. *See, e.g., Share* v. *Air Properties G. Inc.*, 538 F. 2d 279, 282 (9th Cir.), *cert. denied sub nom., Woodruff* v. *Air Properties G. Inc.*, 97 S.Ct. 321 (1976); *Ott* v. *Speedwriting Pub. Co.*, 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams* v. *Mumford*, 511 F.2d 363, 366 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); *Shayne* v. *Madison Square Garden Corp.*, 491 F.2d 397, 399-401 (2d Cir. 1974); *Graci* v. *United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Eisen* v. *Carlisle & Jacquelin* (*Eisen I*), 370 F.2d 119, 120-21 (2d Cir. 1966); *cert. denied*, 386 U.S. 1035 (1967). *See also Hartmann* v. *Scott*, 488 F.2d 1215, 1220 (8th Cir. 1973); *compare, In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975). *Contra, King* v. *Kansas City Southern Industries*, 479 F.2d 1259, 1260 (7th Cir. 1973); *Hackett* v. *General Host Co.*, 455 F.2d 618, 621-26 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

To determine whether a decertification order sounds the "death knell" of the action, we begin by examining the amount of the class representatives' individual claim.[2]

[2] Defendants allege that because the record reveals other members of the purported class who have substantial individual claims, the "death knell" doctrine should not apply. That was the result reached in *Share* v. *Air Properties G. Inc., supra*, 538 F.2d at 283. We do not consider the soundness of that holding, however, because the case is distinguishable on its facts. In *Share* the court referred to class members who were "actively engaged" in the litigation. Here, the record reveals only that certain class members had indicated a willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' new counsel.

Plaintiffs' individual claim for damages totals approximately $2,650. Because this claim falls between those cases where the individual claim is clearly not viable [3] and those cases where the individual claim is viable,[4] we must examine the amount of plaintiffs' claim in relation to their financial resources and the probable cost and complexity of the lawsuit. *See, e.g., Share* v. *Air Properties G. Inc., supra*, 538 F.2d at 282; *Graci* v. *United States, supra*, 472 F.2d at 126; *Korn* v. *Franchard Corp.*, 443 F.2d 1301, 1307 (2d Cir. 1971).

Plaintiffs, both of whom are employed, have an aggregate yearly gross income of $26,000. Their total net worth is approximately $75,000, but only $4,000 of this sum is in cash. The remainder consists of equity in their home and investments.

As of December 1974 plaintiffs had already incurred expenses in excess of $1,200 in connection with this lawsuit. Plaintiffs' new counsel has estimated expenses of this lawsuit to be $15,000. The nature of this case will require extensive discovery, much of which must take place in

[3] *See, e.g., Ott* v. *Speedwriting Pub. Co., supra* ($30); *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971) ($386); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) ("less than $1000"); *Eisen* v. *Carlisle & Jacquelin, supra* ($70).

[4] *See, e.g., Shayne* v. *Madison Square Garden Corp., supra* ($7,482); *Falk* v. *Dempsey-Tegeler & Co.*, 472 F.2d 142 (9th Cir. 1972) ($14,125); *Milberg* v. *Western Pac. R.R.*, 443 F.2d 1301 (2d Cir. 1971) ($8,500).

Florida, where most defendants reside. Moreover, the allegations regarding the prospectus and financial statements will likely require expert testimony at trial.

After considering all the relevant information in the record, we are convinced that plaintiffs have sustained their burden [5] of showing that they will not pursue their individual claim if the decertification order stands. Although plaintiffs' total net worth could absorb the cost of this litigation, "it [takes] no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less." Douglas, *Protective Committees in Railroad Reorganizations*, 47 Harv. L. Rev. 565, 567 (1934). We conclude we have jurisdiction to hear the appeal.

The district court has wide latitude in determining whether an action may be maintained as a class action. If the court applies the proper criteria in making this determination, its decision is reviewable only for an abuse of discretion. *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir. 1975); *Shumate* v. *Nat'l Ass'n of Securities Dealers*, 509 F.2d 147, 155 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); *Kamm* v. *California City Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239, 245 (3d Cir.),

[5] Plaintiffs who seek to invoke the "death knell" doctrine have the burden of developing, in the trial court, an adequate factual record upon which an appellate court may determine whether the action will proceed absent class certification. *Share* v. *Air Properties G. Inc., supra*, 538 F.2d at 282; *Gosa* v. *Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971). As the *Gosa* court indicated, the preferable way to do this is in a post-ruling hearing where the district court has the opportunity to enter appropriate findings of fact. No such hearing was held in the instant case. However, we do not read *Gosa* as requiring such a hearing in all cases. In the instant case, the record of the entire proceeding contains sufficient facts to allow us to make an informed judgment on the matter.

cert. denied, 421 U.S. 1011 (1975); *City of New York* v. *Int'l Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

Because the decertification order in this case was predicated solely on the finding that plaintiffs were not adequate class representatives because they had inordinately delayed in prosecuting the litigation,[6] the sole issue [7] on this appeal may be simply stated: was the district court's decertification order finding plaintiffs to be inadequate class representatives so erroneous as to constitute an abuse of discretion? We answer the question in the affirmative, and we reverse.

The decertification order was apparently based upon three distinct periods of delay. The first period of delay was approximately eight months from the date of filing

[6] As plaintiffs correctly point out, the decertification order was phrased in terms of a denial of defendants' rights to a speedy adjudication of claims against them. This factor is not a proper criterion to consider in determining whether plaintiffs will adequately represent the members of the class. However, a review of the entire record convinces us that the district court was concerned with plaintiffs' failure to prosecute the case as it related to their adequacy as class representatives.

[7] Plaintiffs also seek to raise the following issues: (1) that the decertification order was erroneously predicated on plaintiffs' failure to join underwriters as defendants; (2) that the district court exhibited a lack of fair and impartial judicial procedure; (3) that the district court ordered plaintiffs to follow class action procedures which violate the federal rules; and (4) that the district court violated this court's mandate by not promptly lifting the stay on substantive discovery after certifying the class. The first two claims are devoid of factual support in the record. The third claim is relevant to the decertification order only insofar as it alleges that the class action procedures authorized by the district court impeded the progress of the litigation. As such, it merely restates the allegation that the delay was not caused by plaintiffs. The final claim is moot because the decertification order lifted the stay on substantive discovery. Moreover, as with the third claim, its only relevance to the decertification order is the allegation that the stay of discovery was a contributing cause of the delay.

the complaint until the plaintiffs moved to have the action certified as a class action. The record indicates that this period of time was largely devoted to preparing and amending pleadings and engaging in discovery. We note that plaintiffs filed their motion to certify shortly after defendants filed their last responses to plaintiffs' interrogatories. In these circumstances, we find little to support a finding that plaintiffs were dilatory in moving for class action certification. Furthermore, the general rule is that a delay prior to moving for class action certification is not a basis for refusing certification absent some showing of prejudice. *See, e.g., Bernstein* v. *National Liberty Int'l Corp.*, 407 F. Supp. 709, 714 (E.D. Pa. 1976); *Souza* v. *Scalone*, 64 F.R.D. 654, 656 (N.D. Cal. 1974); *Boring* v. *Medusa Portland Cement Co.*, 63 F.R.D. 78, 80 (M.D. Pa.), *appeal dismissed without opinion*, 505 F.2d 729 (3d Cir. 1974); *Feder* v. *Harrington*, 52 F.R.D. 178, 181-82 (S.D.N.Y. 1970); *Epstein* v. *Weiss*, 50 F.R.D. 387, 392 (E.D. La. 1970) No showing of prejudice was made here.

The second time period referred to in the decertification order was the 14 month period between the motion for class action certification and the order certifying the class. The district court's decertification order attributed this delay to the appointment of new counsel for plaintiffs. However, it should be noted that new counsel for plaintiffs did not appear until *after* the order certifying the class was entered.

The defendants' only colorable allegation of delay during this second period is that plaintiffs were dilatory in moving for an evidentiary hearing on the class action motion. The record discloses that the district court indicated during oral argument that an evidentiary hearing should be held if the court decided that the issue of individual reliance did not bar maintaining the suit as a class action. This decision was reached on July 16, 1975, and plaintiffs did not seek an evidentiary hearing until September 20, 1975, a period of nine weeks. During this nine-week period plaintiffs were not inactive. They moved to enjoin the destruction of documents and also moved to lift the stay on substantive discovery. We cannot say, and the district court did not find, that pursuing these avenues was a sign of inaction, negligence, or a failure adequately to protect the interests of other class members.

The third period of time mentioned in the decertification order is the period from the district court order allowing discovery of the names and addresses of class members until plaintiffs first sought to discover that information.[8] This period runs from October 23, 1975, to April 20, 1976, when plaintiffs first requested Punta Gorda's counsel to furnish the names and addresses of the initial registered owners of the securities. Defendants contend that because plaintiffs have offered no compelling excuse for failing to request this information more promptly, this delay *ipso facto* justified the district court's finding that plaintiffs are inadequate representatives. We disagree.

We begin by noting that there has been no showing that plaintiffs' failure to request production of this information at an earlier date has prejudiced the class members. The

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[8] A persuasive argument can be made that this is the only period of delay upon which the decertification order could properly be predicated. Because the first two periods of delay occurred prior to the certification order, defendants could have raised the issue of failure to prosecute at that time, but did not. They may now be foreclosed from raising the issue based on these delays. *Kramer* v. *Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1975), *rev'd in part on other grounds*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom., Arthur Andersen & Co.* v. *Kramer*, 97 S.Ct. 90 (1976). *Cf. In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975).

notices to the class members could not have gone out until the final form of notice was approved by the court, which did not occur until April 9, 1976. Eleven days later, plaintiffs' attorney telephoned counsel for Punta Gorda and requested that Punta Gorda furnish the names and addresses of the initial registered owners of the securities in question. In a letter dated August 4, 1975, counsel for Punta Gorda had agreed to furnish this information. However, in response to the telephone call, counsel for Punta Gorda wrote a letter to plaintiffs' counsel refusing to furnish this information.[9] In these circumstances we cannot agree that plaintiffs were dilatory in seeking the names and addresses of potential class members. They had every right to expect that defendants would promptly furnish this information. To hold that plaintiffs are inadequate class representatives because they failed to anticipate defendants' eventual objections to discovery would be tantamount to saying that class representatives must be gifted with prescience. This we decline to do.

That there has been undue delay in this lawsuit is beyond question. From examination of the entire record of this protracted proceeding, however, it becomes quite clear that much of the delay in this case is directly attributable to defendants. For example, defendants have been granted 14 extensions of time, totalling approximately 190 days, in which to file pleadings, motions and other papers. In addition, defendants have filed motions to reconsider or modify earlier court orders, which motions have consistently alleged grounds previously ruled upon by the court. The

[9] This refusal was later formalized in objections to plaintiffs' motion to produce. One of the objections to this motion was that the requested information was not in the possession of Punta Gorda, but in the possession of Punta Gorda's transfer agent. Because the transfer agent could only release this information at the direction of Punta Gorda, we find this objection little else than a delaying tactic.

clear import of this course of conduct is to make this lawsuit as time-consuming and costly as possible.

In addition, the district court has on some occasions taken action which did not advance the progress of this litigation. The court took approximately five months to decide the class action certification motion after the evidentiary hearing was held. The court took approximately four months to approve the form of notice to the class members. These delays appear to have been justifiable due to the complex nature of the questions presented. However, during this time there was a stay of substantive discovery in effect. The practical effect of this stay was to prevent the parties from concurrently proceeding to the merits while the court considered the various procedural questions. In these circumstances, virtually all the plaintiffs could do to advance the course of this litigation was to attempt to lift the stay on discovery. Plaintiffs twice sought to lift this stay and were twice unsuccessful.

We conclude that the district court order decertifying the action as a class action because of plaintiffs' failure to prosecute is wholly unsupported by the record, and we accordingly reverse. We do not disturb that portion of the order which lifted the stay on substantive discovery.

The record in this case compels us to make certain further comments. We are dismayed at the utter lack of cooperation between opposing counsel. The record is replete with instances where relatively minor procedural matters have mushroomed into full-scale confrontations, with the concomitant avalanche of briefs, memoranda, etc. By and large, these matters, could, and should, have been settled informally by the parties or, if necessary, in conference with the district court.

Appendix B

Even more disturbing is the tone with which these proceedings have been conducted. All too often the parties have engaged in personal attacks on opposing counsel and the district court. These baseless allegations are not a substitute for advocacy based on the facts and the law and they have no place in our judicial system.

On remand, we anticipate that this conduct will not reoccur. If it does, the district court will be forced to take a more active role in managing this case to insure that it progresses as expeditiously as possible consistent with fairness to the parties. *See Manuel for Complex Litigation* § 1.10 (1973).

In No. 76-1881, the order of the district court is reversed and the cause remanded for further proceedings consistent herewith. In No. 76-1906, the petition for writ of mandamus is dismissed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

28 U.S.C. § 1291.—Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(b).—Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rule 23, F.R.Civ.P.—Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Appendix C

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Appendix C

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and

each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 77-1837

PUNTA GORDA ISLES, INC., *et al.*,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER COOPERS & LYBRAND

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BRIEF FOR PETITIONER COOPERS & LYBRAND

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri are not officially reported but are set forth at pages A-1 to A-3 of the Petition for Writ of Certiorari filed in No. 76-1836 by Petitioner Coopers & Lybrand (hereinafter "Cert. Pet."). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 550 F.2d 1106 and reproduced at Cert. Pet. pp. A-4 to A-16.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1977. Petitioners' timely petitions for rehearing were denied on March 28, 1977. Separate Petitions for Writs of Certiorari were filed on June 23, 1977, by Coopers & Lybrand (No. 76-1836) and by the other defendants (No. 76-1837) and were granted on November 14, 1977, at which time the cases were consolidated for briefing and argument. 46 U.S.L.W. 3332.[1]

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is an order of a district court determining that an action cannot be maintained as a class action appealable pursuant to 28 U.S.C. § 1291 under the "death-knell" doctrine?

2. Did the Court of Appeals exceed the proper scope of its authority in ordering the district court to re-certify this case as a class action?

STATUTES AND RULES INVOLVED

This case involves Sections 1291 and 1292(b) of Title 28, U.S.C., and Rule 23, FED. R. CIV. P., all of which are set forth in their entirety in the Addendum to this brief, *post*.

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[1] On December 5, 1977, the Court granted certiorari in No. 77-560, *Gardner v. Westinghouse Broadcasting Company*, and set that case for oral argument in tandem with the instant matter. 46 U.S.L.W. 3373.

STATEMENT OF THE CASE

The Complaint in this case was filed on July 27, 1973, alleging violations of Sections 11, 12(2) and 17(b) of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77*l*(2) and 77q(a)); Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)); and Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. 240.10b-5). Jurisdiction was invoked under § 22(a) of the 1933 Act (15 U.S.C. § 77v) and § 27 of the 1934 Act (15 U.S.C. § 78aa). Plaintiffs below, respondents here, are Cecil and Dorothy Livesay, husband and wife, who reside in suburban St. Louis, Missouri. Defendants below, petitioners here are, in No. 76-1836, Coopers & Lybrand, a national accounting firm, and, in No. 76-1837, Punta Gorda Isles, Inc., a Florida corporation ("Punta Gorda") and ten individuals who are officers and directors of that company (Apdx. 24-26).

In their Complaint, respondents charged that they had been damaged as the result of allegedly false and misleading statements contained in a registration statement and prospectus issued in connection with a public offering of Punta Gorda debentures and common stock on May 2, 1972 (Apdx. 28-33). Respondents had acquired $5,000 face amount 6% convertible subordinated debentures and 100 shares of common stock in the public offering, which they later sold at a loss of $2,650.00. The complaint, filed on their behalf by a St. Louis lawyer, also contained class action allegations in which respondents purported to represent "all of those persons who purchased the above-described debentures and shares of the common stock of Punta Gorda during the underwriting and public offering thereof which occurred on and following May 2, 1972" (Apdx. 27). Damages were sought in an unspecified amount on behalf of all would-be class members. No equitable relief was prayed for.

Although all of Punta Gorda's officers and directors, as well as its accountants, were named as defendants in the action, none of the members of the underwriting group were joined. The underwriting group was headed by A. G. Edwards & Sons, Inc., of St. Louis and included, among others, the local St. Louis brokerage company of I. M. Simon & Co. (Apdx. 88-91, 157).

Respondents first moved for an order certifying the case as a class action on April 11, 1974, more than nine months after the initiation of the lawsuit, but did not request a hearing at that time (Apdx. 5, 85). Oral argument on the class certification issue was held in the district court in June 1974, at which time it became apparent that a hearing would be required. During the pendency of the class action question, the court, at petitioners' request, had stayed discovery on the merits (Apdx. 6, 86).

On November 1, 1974, respondents filed a Petition for Writ of Mandamus in the Court of Appeals for the Eighth Circuit, asking that the stay on substantive discovery be lifted (Apdx. 9, 103). In their petition, respondents announced that "[r]egardless of whether the Court sustains or denies the class action determination herein [plaintiffs] will at that time commence full and complete discovery of all issues" (Apdx. 106). The Court of Appeals denied the Petition on November 15, stating that:

> "[Plaintiffs] should request a prompt ruling on its [*sic*] motion of April 9, 1974 for an order determining that a class action existed. If an evidentiary hearing is desired, that can likewise be requested. The trial court should then promptly rule on [plaintiffs'] motion and remove its stay order and thereafter permit discovery to proceed on the merits . . ." (Apdx. 107-08).

In the meantime, petitioners had taken the deposition of respondent Cecil Livesay. In response to the question whether he would continue to pursue his individual claim if class action

status were denied, Mr. Livesay said that he was not sure but that he would leave the decision to his attorney and that if his attorney said "yes," he would continue to pursue his individual claim (Apdx. 72-73).

On November 18, 1974, respondents, in accordance with the suggestion of the Eighth Circuit, requested a hearing on the class action question. That hearing was held on December 30. The evidence revealed that respondents' counsel also represented the brokerage firm of I. M. Simon & Co., one of the underwriters in the Punta Gorda public offering. Additionally, respondents' counsel acknowledged that he numbered among his clients several other members of the proposed class of plaintiffs who had sizable claims arising out of that offering:

> ". . . [I]n addition to representing the Livesays, subsequent to the filing of this lawsuit, I have been retained by other individuals to represent them with respect to the losses arising from the public offering, Punta Gorda.
>
> "Those individuals are the following: Mr. and Mrs. Joseph Morrissey, who live in—who are neighbors of mine and have been friends of mine for some twenty-five years. They called me. They sustained a loss of $140,000.00 . . .
>
> "I have been retained to represent a fund in Los Angeles called The Shareholders. . . . They sustained losses in excess of half a million dollars . . . .
>
> "I have been retained to represent a company in Dallas called Regal Capital Company through their lawyer, a Mr. Rosenberg from Dallas. Regal Capital is owned by an individual and he sustained a loss of $18,000.00 . . . .
>
> "I have been retained to represent a Mr. David Kleg and his wife and child, who live in Salt Lake City, and they sustained a loss of—I believe $50,000.00" (Apdx. 151-52).

Respondents' counsel also testified that if class action status were not granted, the local claimants would intervene in this case and "I have specific instructions and suits will be filed" in other jurisdictions on behalf of the nonresident claimants (Apdx. 153).

After receipt of respondents' final brief on the class action certification question on May 26, 1975 (Apdx. 11), the district court entered an order on June 19, 1975, determining that the case could proceed as a class action on behalf of some 1800 purchasers of Punta Gorda securities (Apdx. 168). At the same time, however, the court found that respondents' counsel, in view of his representation of I. M. Simon & Co., had a conflict of interest and ordered him to show cause why he should not be removed as attorney for the class (Apdx. 11, 169-73). Rather than contesting the court's conclusions, counsel withdrew from the case (Apdx 12, 173).

Almost simultaneously, New York counsel appeared on behalf of respondents and was asked by the court to make a determination of the feasibility of joining the underwriters as defendants (Apdx 12, 179). Having received no satisfactory answer,[2] the district judge on October 23, 1975, in response to petitioners' Motion for Reconsideration, or in the Alternative, for Modification (Apdx. 12, 178), tentatively refused to revoke his class certification order but expressed his concern with respondents' adequacy as representatives of the class, saying that "the presence of new counsel does not in itself erase the shadow of inadequate representation previously cast . . . ." (Apdx. 187). (The court did not disband the class at that time for fear of "jeopardiz[ing] potentially valid claims held by absent class members" (Apdx. 188) but ordered a notice sent to the class members advising

[2] Respondents later admitted in an affidavit (Apdx. 15) that they had concluded that the statute of limitations had expired on claims against the underwriters during the period in which the conflict of interest issue had been suppressed.

them, *inter alia*, of the history of the litigation and informing them "that the Court requests petitions for appointment of new class representatives or in the alternative, intervention by class members" (Apdx. 188). That order also directed respondents to conduct discovery to ascertain the names and addresses of the members of the class.

Thereafter, while trying to avoid sending out the notice in the form suggested by the court so as to preserve and solidify their status as class representatives, respondents failed for six more months, until April 1976, to request, even informally, the names of the class members. When they were advised promptly by counsel for Punta Gorda that the information they had requested would not accurately reflect the names of the members of the class (Apdx. 215), respondents again delayed for three more months until July 20, 1976, before initiating the discovery which had been directed by the court almost ten months earlier (Apdx. 200).

Against this backdrop, petitioners, on July 23, 1976, filed a Motion to Decertify the class action on a number of grounds, including, in particular, respondents' inadequacy as class representatives and their delay in pursuing the case. On September 1, 1976, the district court entered an order disestablishing the class action, holding that "[s]ince this lawsuit has been pending for approximately three years, and class action notices have not gone out more than a year after the action was certified as a class action, the Court is forced to the conclusion that there has been a lack of prosecution on the part of the plaintiffs as class representatives" (Cert. Pet., p. A-3). The court thus found it unnecessary to rule on any of the other grounds raised by petitioners in support of their Motion to Decertify.

Respondents did not request the district court to certify its order for immediate appeal under the provisions of 28 U.S.C. §1292(b). They merely filed a notice of appeal and later, in a

separate proceeding, sought a writ of mandamus from the Eighth Circuit. Petitioners filed a motion to dismiss the appeal (Apdx. 210), which was ordered by a panel of the court to be taken with the case. The appeal (No. 76-1881) and the mandamus action (No. 76-1906) were consolidated by the Court of Appeals for briefing and argument. On March 4, 1977, a three-judge panel filed an opinion holding (a) that the decertification order was "final" and appealable under §1291 pursuant to the "death knell" doctrine and (b) that the district court's order revoking the class action designation "is wholly unsupported by the record" (Cert. Pet., pp. A-11, A-15). The Court of Appeals reversed the judgment of the district court and effectively ordered the case to be recertified as a class action. It did not discuss any of the other reasons suggested for decertification in petitioners' Motion to Decertify, nor did it consider whether the other requirements of Rule 23 had been met or whether the action had been properly certified in the first place. Respondents' petition for a writ of mandamus in No. 76-1906 was dismissed as moot. Rehearing by the panel and the court *en banc* was denied on March 28, 1977 (Cert. Pet., p. A-19).

Separate petitions for certiorari were filed on June 23, 1977 by Coopers & Lybrand (No. 76-1836) and by Punta Gorda and the individual defendants (No. 76-1837). Respondents did not cross-petition from the dismissal of their mandamus action. On November 14, 1977, both petitions were granted and the cases consolidated. This brief is being filed on behalf of Coopers & Lybrand, petitioner in No. 76-1836.[3]

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[3] Certain additional facts will be set forth below in the Argument where appropriate.

SUMMARY OF ARGUMENT

I

The initial—and, we submit, dispositive—question raised by the Petitions in this Court is whether the Court of Appeals had jurisdiction to review the district court's order decertifying this case as a class action. Since respondents did not attempt to avail themselves of the certification mechanism contained in 28 U.S.C. §1292(b), the Eighth Circuit's power to hear this case depends solely on the validity of the controversial "death knell" exception to the "final decision" requirement of §1291. We respectfully suggest that the death knell doctrine constitutes an improper judicial revision of the plain language of §1291 and that the Third and Seventh Circuits have therefore correctly rejected the doctrine. *Hackett v. General Host Corporation*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976).

An order cannot be deemed "final" unless discontinuation of the action is the "necessary result" of the order. *Carroll v. United States*, 354 U.S. 394, 405 (1957). The decertification order appealed from here did not operate in any way on respondents' individual claim of $2650. Hence, any discontinuation of this case would not be the "necessary result" of the court's order but, rather, would be the voluntary outgrowth of an economic decision by respondents' lawyer to abandon the case once the "*in terrorem*" prospects of class action recovery or settlement had disappeared. Respondents acknowledged both that their personal claim was not *de minimis* and that they would permit their attorney to make the decision whether to prosecute their individual case if the class action were disallowed. Nevertheless, the Court of Appeals, looking only at the amount of respondents' claim, their net worth, and the prob-

able cost and complexity of the lawsuit, summarily concluded that respondents would abandon the litigation if they were denied the opportunity to represent a class and therefore that the district court's decertification ruling was final and appealable.

The death knell theory has been widely criticized and is neither a proper nor a desirable exception to the finality requirement of § 1291. It flatly ignores the language of Rule 23, which makes class action rulings conditional and provides that they may be altered or amended at any time. The doctrine is discriminatory in that it is available to class action plaintiffs but not to defendants, thus very likely increasing the number of class actions in the federal courts. It also unwisely expands the number of appeals in the federal system and, in the process, requires appellate judges to assume the role of fact-finders on an *ad hoc* basis while failing to provide them with a sufficient record upon which to make the necessary determinations.

The death knell rule effectively creates a separate, protectable substantive right in the attorney for a class-action plaintiff by permitting an appeal of a clearly interlocutory order merely because the attorney considers it economically unfeasible to represent only the named plaintiff. Finally, as reflected by the record in the instant case, the availability of a death knell appeal inspires the maintenance of litigation by plaintiffs who have little personal stake in the outcome of the case.

The death knell doctrine is antithetical to the certainty sought by Congress in enacting § 1291 and to the long-established policy against piecemeal appeals. It engenders chaos and confusion, and its endorsement by this Court would spawn additional pleas for new exceptions to the final judgment rule. There is no good reason why appellate review of class certification denials should not await final judgment like other interlocutory orders, except in those instances where § 1292(b) can be utilized.

The purpose of the death knell rationale was not to endow the named class representative with a special right of immediate appeal but rather to make sure that the refusal to certify does not forever deprive the members of the purported class of the opportunity to challenge that refusal in the appellate courts. Hence, if there ever was a need for the death knell rule, that need has dissipated in the wake of *United Airlines, Inc. v. McDonald*, — U.S. —, 53 L.Ed. 2d 423 (1977). The Court there held that members of the would-be class may intervene after final judgment to appeal an earlier order denying class certification. Hence, even if the named plaintiff chooses to abandon his claim, other putative class members may obtain review of the class action ruling. The very *raison dêtre* of the death knell doctrine has thus been completely undercut by the *United Airlines* decision.

Furthermore, even if the death knell rule were a legitimate concept, the decertification order of the district court in this case was not appealable. Respondents acknowledged that their claim was viable, and the record revealed the existence of several other large claimants who admittedly were ready either to intervene in respondents' case or to institute their own actions.

II

Following its erroneous assumption of jurisdiction, the Court of Appeals summarily swept aside the district court's decertification order by simply substituting its judgment for that of the trial judge on the question of whether respondents had diligently prosecuted the action. The appellate court, on the basis of a cold record, discounted the facts that respondents had originally delayed for nine months in seeking class certification and that they later waited nine additional months before instituting discovery procedures to ascertain the names and addresses of class members. In the process of its usurpation of the district judge's discretion, the Court of Appeals misconstrued the record and

ordered the class to be recertified without any consideration of the other factors raised in petitioners' Motion to Decertify—including the suitability *vel non* of respondents as class champions, which had been repeatedly questioned by the district judge. The Court of Appeals also failed to analyze whether the other requisites of Rule 23 had been met or whether the case should have been designated for class action treatment in the first instance.

Rule 23 commits the supervision of class actions to the continuing sound discretion of the district judge. The Eighth Circuit exceeded the proper scope of its authority in interfering with that discretion, and its ruling is irreconcilable with *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

ARGUMENT

I. The Court of Appeals Did Not Have Jurisdiction of Respondents' Purported Appeal From the District Court's Order Decertifying This Case as a Class Action.

A. Section 1291 Permits Appeals Only From "Final Decisions."

The Court of Appeals entertained respondents' appeal on its merits under 28 U.S.C. § 1291, which reads in pertinent part as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

This Court has said that " 'the final judgment rule is the dominant rule in federal appellate practice.' " *DiBella v. United States*, 369 U.S. 121, 126 (1962). The requirement of finality is of ancient origin and can be traced back in American law to the Judiciary Act of 1789.[4] In fact, its roots are in the English common law, which permitted appeals only from the final disposition of an action. See *Holcombe v. McKusick*, 20 How. (61 U.S.) 552 (1857); *Metcalfe's Case*, 11 Co. Rep. 28a, 77 Eng. Rep. 1193 (K.B. 1615). Just last term, this Court reiterated that "there has been a firm Congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy. Finality of judgment has been required as a predicate for federal appellate jurisdiction." *Abney v. United States*, — U.S. —, 52 L.Ed. 2d 651, 658 (1977).

The final judgment rule recognizes that the appellate process does not exist as a matter of right and should not be used to

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[4] Sections 21, 22 and 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85.

disrupt an on-going judicial proceeding. *United States v. Nixon*, 418 U.S. 683, 690 (1974); *Parr v. United States*, 351 U.S. 513 (1956). Perhaps Mr. Justice Frankfurter said it best in his oft-quoted opinion for a unanimous Court in *Cobbledick v. United States*, 309 U.S. 323, 325 (1940):

> "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."

See also *Bachowski v. Usery*, 545 F.2d 363, 373-74 (3d Cir. 1976); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 334 (1959).[5]

While urging a "practical" construction of jurisdictional statutes, the Court has also cautioned that they must be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." *Palmore v. United States*, 411 U.S. 389, 396 (1973), quoting from *Cheng Fan Kwok v. Immigration & Naturalization Service*, 392 U.S. 206, 212 (1968). Taken literally, the term "final decision" means nothing less than the order which ends the litigation on its merits and leaves nothing to

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[5] Another obvious purpose for the finality requirement is to postpone the appeal on an issue concerning which the trial court might change its mind. *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 70 (2d Cir. 1973).

be done except to execute the judgment. *Catlin v. United States*, 324 U.S. 229 (1945); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948). Long ago, however, it became evident that it is frequently easier to conceptualize about a "final" decision than to recognize one. In 1892, this Court in *McGourkey v. Toledo & Ohio Central Railway Co.*, 146 U.S. 536, 544-45 (1892), observed that "probably no question of equity practice has been the subject of more frequent discussion in this Court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." More recently, Mr. Justice Powell, speaking for the Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) (*Eisen IV*), said:

> "While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."

It is still generally true, however, that a judgment cannot be deemed "final" within the contemplation of §1291 unless it disposes of all parties and all issues. See, *e.g.*, *Wrist-Rocket Mfg. Co. v. Saunders Archery Co.*, 516 F.2d 846 (8th Cir.), *cert. denied*, 423 U.S. 870 (1975); *Kappelman v. Delta Air Lines, Inc.*, 539 F.2d 165 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); *International Controls Corp. v. Vesco*, 535 F.2d 742 (2d Cir. 1976). While the courts have tried, with varying degrees of success, to resist the temptation to bend the final judgment rule to fit a particular case or class of cases, Congress has sought to ameliorate the occasional harshness of literal application of the rule by enacting §1292(b), which permits discretionary interlocutory appeals upon the certification of the district court and the acquiescence of the appellate court. This Court has adopted Rule 54(b), FED. R. CIV. P., in order to facilitate prompt review of judgments which are in fact final as to some parties and/or some issues if the trial court certi-

fies that there is "no just reason for delay" in entering a "final judgment."[6]

In 1949, the Court also recognized an exception to the finality requirement which would permit prompt appellate consideration of a certain "small class" of interlocutory decisions which (a) are separable from and collateral to the issues being contested in the main action, (b) present serious and unsettled legal questions and (c) are too important to be denied review. This "collateral order" doctrine was first articulated in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), and has proven effective as a narrow but flexible exception, as witnessed by its recent invocation in a criminal context in *Abney v. United States, supra*. See generally 15 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §3911 (1976). The *Cohen* rule was designed to obviate the probability that important collateral orders might finally determine rights which would be irreparably lost by the time of final disposition of the case. *Cohen, supra* at 546. Hence, an order cannot be considered final under *Cohen* if it could be "subject to effective review as part of the final judgment in the action." *Parr v. United States, supra* at 519; *United States v. Ryan*, 402 U.S. 530, 533 (1971).

In all of the semantic struggles fought to confer some measure of precision on the term "final," no class of cases has created more controversy or disharmony than those involving attempted appeals from district court rulings on requests for class action certification under Rule 23. Prior to 1966, orders striking class action allegations were almost universally held

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[6] The district court was not asked by respondents to certify its order under either § 1292(b) or Rule 54(b), and no such certification was made. Nor is § 1292(a)(1), which deals with appeals from grants or denials of injunctive relief, implicated here. Respondents did not seek any injunctive relief in the instant case and have never attempted to justify the jurisdiction of the Court of Appeals under § 1292(a)(1).

not to be appealable under §1291. *See Caceres v. International Air Transport Association*, 422 F.2d 141, 143 (2d Cir. 1970). The 1966 amendments to Rule 23, however, created a new set of "finality" problems and spawned a new appendage to §1291 known as the "death knell" doctrine. That doctrine has suffered through a decade of turmoil and has severely splintered the various Circuits. This Court has never passed on the legitimacy of the death knell rule, and this case presents the appropriate vehicle for such a determination.[7]

B. The Death Knell Doctrine Is Neither a Valid, a Desirable, Nor a Necessary Exception to the Finality Requirement.

1. The death knell doctrine represents an improper interpretation of §1291.

The death knell doctrine was first formulated by the Second Circuit in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (*Eisen I*). The court there noted that the individual plaintiff-class representative had a stake of only $70 in his lawsuit and stated, *l.c.* 120, that "[W]e can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen." The Second Circuit declared that, in refusing to permit the action to proceed as a class action, the district court had "for all practical purposes" terminated the litigation and sounded "the death knell of the action." *Id.*

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[7] In *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*), the Court of Appeals had "retained" jurisdiction under the death knell theory of the order certifying the case as a class action. This Court in *Eisen IV* did not adjudge the propriety of that procedure but ruled instead that the Court of Appeals had jurisdiction under the collateral order doctrine *of the order allocating the cost of class notification.*

at 121. Hence, the court concluded that the order was final and appealable under §1291.[8]

The practical problems inherent in any attempt to apply this new doctrine on an *ad hoc* basis are manifold and soon became manifest. In *Milberg v. Western Pacific Railroad Co.*, 443 F.2d 1301 (2d Cir. 1971), and *Korn v. Franchard Corporation*, 443 F.2d 1301 (2d Cir. 1971), the court was faced with consolidated appeals from two class action denials, one brought by plaintiffs seeking damages for themselves of $8500

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[8] The court in *Eisen I* attempted to justify the new death knell rule as a refinement of the collateral order doctrine of *Cohen*. Such a characterization ignores the fact that *Cohen* applies only to orders which are admittedly not final, whereas the *Eisen* theory is ostensibly based on finality. It has generally been recognized that the death knell doctrine is a concept unto itself, separate and distinguishable from collateral order reasoning. *Share v. Air Properties G. Inc.*, 538 F.2d 279 (9th Cir. 1976), *cert. denied*, 429 U.S. 923 (1976); *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975); 15 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3912, p. 511.

Furthermore, it is abundantly clear that the collateral order doctrine does not fit the situation created by a denial of class action certification. *Kramer v. Scientific Control Corporation*, 534 F.2d 1085 (3d Cir. 1976); *Cotten v. Treasure Lake, Inc.*, 518 F.2d 770 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975); *Siebert v. Great Northern Development Co.*, 494 F.2d 510 (5th Cir. 1974). Refusals to certify class actions do not meet *any* of the criteria of the *Cohen* doctrine because (a) they do not "finally" determine any rights collateral to the main action; (b) they do not usually present a "serious and unsettled" legal question which is "too important to be denied review"; and (c) appellate review will not be irreparably lost if it awaits final judgment. *Samuel v. University of Pittsburgh*, 506 F.2d 355, 360-61 (3d Cir. 1974); *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976); *In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 216-17 (8th Cir. 1977); *see* 15 WRIGHT & MILLER § 3912, p. 511; Comment, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548, 555 (1975). Nor are class certification denials appealable under the narrowly construed and little-used exception of *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 150 (1964), because they are not "fundamental to the further conduct of the case."

and the other by an individual claiming only $386.[9] The majority, while registering doubt as to the wisdom of the doctrine at a time when appellate courts "are now being overwhelmed by an unprecedented number of appeals," nevertheless held that the second judgment was "final" but that the first was not. *Id.* at 1305. Judge Friendly, concurring, voiced reservations whether the death knell doctrine "affords a rule that is truly workable or, indeed, is legally sustainable." *Id.* at 1307. He also suggested that the *en banc* court should "formulate a rule that will avoid the necessity of making such *ad hoc* judgments as have been required in these and other cases and also will afford equality of treatment as between plaintiffs and defendants," and he requested "enlightenment from the Supreme Court." *Ibid.*

Subsequent Second Circuit cases took note of the "rumblings of disapproval in our Court" over the death knell doctrine. *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 400 (2d Cir. 1974); *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094, 1097 (2d Cir. 1974). In *Parkinson v. April Industries, Inc.*, 520 F.2d 650 (2d Cir. 1975), the Second Circuit openly questioned the vitality of its own offspring, and Judge Friendly announced that his misgivings had crystallized to the point that he would abolish the death knell doctrine altogether.[10]

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[9] Technically, *Milberg* involved an order denying class suit designation while *Korn*, like the instant case, was concerned with revocation of an earlier class certification. In analyzing the validity or the application of the death knell doctrine, there is no reason to differentiate between initial refusals to certify and orders decertifying the class.

[10] On several occasions, the Second Circuit eschewed *en banc* reconsideration of the doctrine in anticipation of resolution of the death knell question by this Court in *Eisen IV*. See, *e.g.*, *Shayne v. Madison Square Garden Corp.*, *supra* at 400 n.9; *Kohn v. Royall, Koegel & Wells*, *supra* at 1095 n. 6; and the concurring opinions in *Herbst v. International Telephone & Telegraph Co.*, 495 F.2d 1308, 1317, 1325 (2d Cir. 1974).

In the meantime, the death knell theory was attracting few supporters outside its home Circuit. In *Hackett v. General Host Corporation*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972), the Third Circuit flatly rejected the doctrine in a case where the individual plaintiff's personal claim, after trebling, amounted to only $27.00. Judge Gibbons' penetrating majority opinion expressed concern that the death knell theory was unbalanced because it applied only to plaintiffs and not defendants. He also emphasized that the rule operates primarily, if not exclusively, in non-diversity cases in which attorneys are willing to undertake claims on a contingent fee basis, chiefly under the federal antitrust and securities statutes. *Id.* at 623.[11] After weighing the competing values, the court held that in the absence of a § 1292(b) certification or the availability of mandamus, the policy of finality underlying § 1291 should be deemed paramount to any countervailing considerations which might favor immediate review of class certification rulings. The court focused sharply on the inescapable fact that class actions are more often maintained for the benefit of lawyers than clients and that the death knell rule actually creates substantive rights in the plaintiff's attorney:

> "Mrs. Hackett's disinclination to proceed with her lawsuit unless her attorney is allowed to represent many others besides herself does not move us to convert by an *ipse dixit* an order which as to her is clearly interlocutory into a final appealable order. We come down, then, to the question whether . . . we should recognize the attorney deprived of the quixotic opportunity of representing one and one-half million potential claimants . . . as a private attorney general with standing of his own to appeal the adverse class action decision. When all is said and done

[11] The death knell theory is inoperable in diversity jurisdiction class actions inasmuch as the named plaintiffs are required to possess individually viable claims in excess of $10,000 in order to pass the jurisdictional threshold. *Snyder v. Harris*, 394 U.S. 332 (1966).

> this pragmatically is the core issue, though conventional pieties about the role of the legal profession might suggest its obfuscation. *Realistically, when we are asked to grant interlocutory appellate review of an adverse class action determination we are asked to recognize a separate interest of the attorney sufficient to bring the class action determination within the 'collateral order' doctrine, or to recognize the standing of the attorney's client to assert such an interest on his behalf. We decline to do either.*" *Id.* at 625 (Emphasis supplied; footnotes omitted.)[12]

The Seventh Circuit, in *King v. Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973), also squarely disapproved the death knell theory, and that determination was reaffirmed by the Court *en banc* in *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976). In *Anschul*, the court observed, *l.c.* 1366-67, that although the death knell doctrine had been born ten years earlier, "the idea never really has reached maturity." The court identified the widespread discontent with the rule as emanating from its mechanical nature and the fact that it unfairly discriminates against defendants as well as against other plaintiffs who have the financial wherewithal to sponsor litigation on their own behalf.

In evaluating the legitimacy of the death knell doctrine as an interpretation of § 1291, it is especially noteworthy that an order which is pronounced "final" by application of the doctrine does not acquire its "finality" by virtue of any court order but rather by the voluntary decision of the plaintiff—or, more realistically, his lawyer. The decision by the district judge in this

[12] The Third Circuit *en banc* confirmed the rejection of the death knell doctrine in *Katz v. Carte Blanche Corporation*, 496 F.2d 747 (3d Cir. *en banc*), *cert. denied*, 419 U.S. 885 (1974), and held that in the absence of certification or mandamus, review of class action determinations must await final judgment.

case was certainly not a "final" judgment in any sense of the term. It did not operate on respondents' claim in any way. Respondents still have the same individual claim they have always had, which is clearly not *de minimis* and which is viable if they choose to pursue it. The Court of Appeals, however, surmised that respondents' attorney would opt to abandon the case if the *"in terrorem"* prospects of a class action recovery or settlement were withdrawn, and that the ruling of the district court therefore constituted a final judgment. It is a source of mystery how an economic decision by respondents' counsel can confer finality on an order that is palpably interlocutory. In *Carroll v. United States*, 354 U.S. 394, 405 (1957), it was held that an order is not final unless discontinuation of the action is the "necessary result" of the order. The death knell theory cannot be squared with that reasoning.

The death knell doctrine embodies an unwarranted judicial revision of § 1291 and disregards the teaching of this Court that "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States, supra* at 405. It is also disrespectful of the precept that legislation is the province of Congress, not the courts. Speaking of the finality requirement in *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181-82 (1955), the Court said:

> "This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. *Shanferoke Corp. v. Westchester Corp.*, 293 U.S. 449, 451. Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain."

In light of the foregoing principles, it is scarcely surprising that most courts have either rejected the death knell theory originally conceived in *Eisen I* as an improper interpretation of § 1291 or have so circumscribed its use as to render it virtually nugatory.[13]

2. The death knell doctrine represents an inappropriate and undesirable response to problems created by class action certification rulings.

There are a number of recurring reasons woven throughout the various judicial opinions supporting and explaining the substantial criticism which has been heaped upon the death knell doctrine. We have already adverted to the oft-repeated observation that the doctrine is discriminatory by reason of its availability to plaintiffs but not to defendants.[14] Furthermore, since a ruling adverse to a class action plaintiff is immediately appealable under the doctrine, whereas an order granting class action status is not, it is likely that the doctrine fosters a subtle but pervasive systemic bias in favor of plaintiffs in class action determinations. Any factor which tends to increase the number

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[13] In addition to the cases already discussed, see, *e.g., Lamphere v. Brown University*, 553 F.2d 714 (1st Cir. 1977); *Graci v. United States*, 472 F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143 (6th Cir. 1975); *Falk v. Dempsey-Tegeler & Co., Inc.*, 472 F.2d 142 (9th Cir. 1972); *West v. Capitol Federal Savings & Loan Ass'n.*, 558 F.2d 977 (10th Cir. 1977); *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975).

[14] In an effort to counteract this obvious and frequently criticized deficiency in its original death knell formulation, the Second Circuit has developed a so-called "reverse death knell" procedure for reviewing *grants* of class action certification. *See Eisen III, supra*, 479 F.2d at 1007 n. 1; *Herbst v. International Telephone & Telegraph Co., supra*. That doctrine, too, has given rise to problems in its application, see *Kohn v. Royall, Koegel & Wells, supra*, and *General Motors Corporation v. City of New York*, 501 F.2d 639 (2d Cir. 1974); Comment, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548 (1975). However, considerations of fundamental fairness dictate that any ruling by this Court endorsing the death knell doctrine for plaintiffs should also extend its benefits to defendants. If anything, it would seem more important, more urgent and, in the long run, more economical, to permit early review of *grants* of class action certification than to hear interlocutory appeals from *denials* of class action status.

of class actions in the federal system, particularly for reasons extraneous to the purposes of Rule 23, only serves to heighten the concern repeatedly expressed by this Court for the "danger of vexatious litigation which could result from widely expanded class of plaintiffs under Rule 10b-5." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975), as quoted in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977).

As noted earlier, the death knell rule defies the maxim capsulized by this Court in *Carroll v. United States*, 354 U.S. 394, 405 (1957): "Appeal rights cannot depend on the facts of a particular case." It also ignores the further lesson of *Carroll, l.c.* 406: "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable." The most fundamental fallacy in the death knell theory, however—and one that is frequently overlooked by the courts—is that it flies directly in the face of the specific language of Rule 23. Rule 23(c)(1) takes cognizance of the need for constant supervision by the trial judge over class actions and expressly provides, with respect to determinations of class action status, that "an order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." One thoughtful commentator has noted that: "An order that is tentative, inconclusive, or subject to future review by the lower court would appear to lack the requisite finality for appeal." Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 315 (1966). By definition, then, an order certifying, decertifying or refusing to certify a class action is subject to amendment by the trial court and, therefore, is not final. *Gerstle v. Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972); *Caceres v. International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970).[15]

[15] For the same reason, Rule 54(b) is inapplicable to class action certification rulings. Rule 54(b) may be employed only with respect to an order which is final in its own right and cannot be used to confer finality on an interlocutory order. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976).

Another serious shortcoming in the death knell rationale is that it requires the appellate court to make factual determinations, often on an inadequate record, and to engage in unbridled conjecture concerning the likelihood of the continuation of the action on the part of the individual plaintiff. This is an inefficient utilization of judicial manpower and unnecessarily burdens the already overworked appellate courts.[16] Furthermore, the death knell inquiry has almost always focused exclusively on the *amount* of the named plaintiff's claim, whereas a proper analysis would also include such factors as the probability of success, the feasibility of intervention of other interested parties, the willingness of plaintiff's counsel or other class members to advance the costs of the litigation, and the difficulty of the issues presented. In the overwhelming majority of cases, the record compiled in the district court simply does not address these issues, and the appellate court is relegated to a guess about the named plaintiff's intentions.

Problems of this type, as well as the overriding desire for efficiency in the court system, serve to vindicate the Third Circuit's conclusion that §1292(b) certification is the most appropriate avenue for review of class-action determinations. Section 1292(b) certification is preferable because the district judge, who is already familiar with the record and with the sometimes subtle nuances of the litigation, is in the best position to assess the substantiality of the disputed issues and the economies of immediate review. The legislative history of §1292(b) includes the report of a committee of the Tenth Circuit which summarizes the advantages of certification:

> "Requirement that the trial court certify the case as appropriate serves the double purpose of providing the

[16] Unwillingness to engage in such "rank speculation" has prompted the Fifth Circuit to require the would-be class representative to establish in the district court the nonviability of his individual claim. *See Gosa v. Securities Investment Co.*, 449 F.2d 1330, 1332 (5th Cir. 1971). If the record presented to the Court of Appeals does not contain an affirmative showing of nonviability, the appeal will be dismissed for want of jurisdiction. *Graci v. United States*, 472 F.2d 124 (5th Cir.) *cert. denied*, 412 U.S. 928 (1973).

> appellate court with the best informed opinion that immediate review is of value and at once protects appellate dockets against a flood of petitions in inappropriate cases. It is the opinion of the committee that avoidance of ill-founded applications in the court of appeals for piecemeal review is of particular concern."

1958 *U.S. Code Cong. & Admin. News*, 5262-63 (85th Cong. 2d Sess. 1958); *cf.* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. §1292(b)*, *88* HARV. L. REV. 607, 633 (1975); Note, 44 FORDHAM L. REV. 433, 437 (1975). Significantly, one of the drafters of the 1966 amendments to Rule 23 has proposed §1292(b) as the most desirable method for the prompt testing of class action rulings. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 n. 131 (1967); *see also, Report of American Bar Association Special Committee Federal Rules of Procedure*, 38 F.R.D. 95, 104 (1965). And in practice, §1292(b) has been utilized effectively to review denials of class certification in a number of cases. *E.g., Susman v. Lincoln American Corp.*, 561 F.2d 86 (7th Cir. 1977); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *Kamm v. California City Development Co.*, 509 F.2d 205 (9th Cir. 1975); *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459 (10th Cir. 1974); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).

Endorsement by this Court of the death knell rubric would inevitably open the door to pleas for even more exceptions to the final judgment rule. The logical extension of the death knell doctrine outside the class action context would permit any plaintiff to appeal from any order if he could convince the appellate court that he would choose to discontinue the litigation if his appeal was not allowed. Bearing in mind that the quest for certainty is the bedrock of the final judgment rule, it is apparent that the death knell doctrine has chipped away

at that foundation and that the many possible corollaries of the doctrine could well cause the substitution of chaos and unpredictability for the certainty sought by Congress.

One of the ironic but inevitable by-products of this flexible approach to finality is that litigants face the undesirable risk that failure to appeal from a particular ruling at the time of its entry will constitute a waiver of the right to appeal at the conclusion of the case. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1950); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956). Faced with such a perilous prospect, a prudent lawyer will be forced to appeal many interlocutory orders, including most class certification rulings, thereby disrupting the adjudicatory process, adding costs and unwanted delay, and undermining confidence in the trial court. Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 317 (1966). Proponents of the death knell doctrine appear oblivious or insensitive to its ramifications upon the dockets of our appellate courts and to the warning of this Court that the final judgment rule and exceptions thereto must be approached "somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Ass'n. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966).[17]

The mere existence of the death knell doctrine has still another pernicious effect which is vividly depicted by the record in this case. By permitting appeals in cases instituted by plaintiffs with insignificant amounts at risk, the doctrine encourages litigation by those who have the least at stake. The record here reveals that respondents' original counsel also represented two of his own neighbors, Mr. and Mrs. Joseph Morrissey, whom

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[17] More than 19,000 appeals were filed in the federal system in the fiscal year ending in June 1977, almost three times as many as in 1966 when *Eisen I* was decided. *1977 Annual Report of the Director, Administrative Office of the United States Courts*, Table I, p. 65a.

he described as "millionaires" and "friends of mine for some 25 years," and who had allegedly suffered a loss of $140,000 in the Punta Gorda transaction (Apdx. 151-52). The same attorney further acknowledged that he had also been retained by (a) a Fund with a claim for more than $500,000, (b) an individual and his wife who had allegedly lost $50,000, and (c) another company which claimed damages in the approximate amount of $18,000 (Apdx. 152).[18] Yet this lawsuit was instituted only on behalf of respondents, whose alleged losses totalled $2650, and whose resources are modest, while none of the major claimants made any attempt to intervene. It is certainly permissible to infer that this entire action was structured for the purpose of taking advantage of the death knell theory. Such tactics should neither be encouraged nor rewarded.

Even if it be assumed that respondents would choose to abandon their individual claim in the absence of a death knell appeal, there is an important policy question which should attend that choice. This Court must consider whether the federal judicial system should subject itself to the burdensome cost of interlocutory appeals merely to accommodate claimants whose stake in the proceedings is such that they would choose not to walk at all if forced to walk alone. If indeed respondents and their counsel think so little of their claim as to forsake it, then the sentiments espoused in *Hackett* may well dictate that their own appraisal of their claim should be accepted by the courts:

> "Our scarce judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong however slight. . . . If in some cases . . . the individual claim often will be so small that neither private nor public lawyers think it

[18] Respondents' original counsel stated that these clients had instructed him either to intervene in this case or to file individual suits on their behalf if this case were not allowed to proceed on a class basis (Apdx. 153).

> should be litigated, then that decision of the legal market place may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." 455 F.2d at 626.

3. The death knell doctrine is unnecessary as a result of *United Airlines, Inc. v. McDonald*, — U.S. —, 53 L.Ed. 2d 423 (1977).

In addition to all the foregoing factors militating against the adoption of the death knell theory, this Court's decision last term in *United Airlines, Inc. v. McDonald*, — U.S. —, 53 L. Ed. 2d 423 (1977), renders the doctrine completely unnecessary and superfluous. *United Airlines* arose out of an action by a former stewardess named Romasanta challenging United's "no marriage" rule as discriminatory against females. A few months after the action began, the district court dismissed the class action allegations but permitted intervention by twelve married stewardesses who had previously protested United's policy. The Court of Appeals refused to entertain an appeal from the order denying class certification. Several years later, the parties to the action agreed to settle their differences and, pursuant to that agreement, the trial court entered a judgment of dismissal. At that time, upon learning of the named plaintiffs' decision not to appeal the earlier adverse class action ruling, former stewardess McDonald, who was a member of the original putative class, filed a motion to intervene and a notice of appeal of the class action order.

The district court dismissed the application as untimely, but the Seventh Circuit reversed and held both that the application was seasonable and that the denial of class action certification some three years earlier was erroneous. This Court, reviewing only the intervention question, affirmed, noting that the refusal to certify could have been appealed "after final judg-

ment" by the named plaintiffs and that since they were disinclined to appeal, McDonald could intervene to prosecute the appeal.[19]

United Airlines has rendered the death knell doctrine obsolete. If respondents should litigate their claim to a conclusion, the class action denial can be tested at that time either by respondents or by other putative class members upon timely motion to intervene. Conversely, if respondents and their counsel deem their claim to be unworthy of pursuit and dismiss their case, other members of the would-be class could then intervene under the rationale of *United Airlines* to challenge the propriety of the district court's decertification order.[20] Inasmuch as the purpose of the death knell theory is *not* to facilitate an immediate review of class action rulings but "to make certain that the refusal to certify does not deprive the members of the purported class of an opportunity for review in due course of the refusal on appeal," *Hooley v. Red Carpet Corporation*, 549 F.2d 643, 645 (9th Cir. 1977), the *United Airlines* decision strips the death knell doctrine of its asserted purpose and permits the graceful early retirement of a well-intentioned idea which is unfounded in law or logic and unworkable in practice.

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The death knell doctrine was conceived in the conviction that the class action was a salutary and efficient utensil for redressing wide-scale wrongdoing. But since the initial surge of exuberance which accompanied promulgation of new Rule 23 a

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[19] Implicit in this holding is the determination that the judgment did not become final and appealable until the entry of the district court's order of dismissal following the settlement.

[20] There is also authority for the proposition that the named class representative himself may convert an adverse interlocutory class certification order into an appealable final judgment if he voluntarily dismisses his individual action under Rule 41(a). *See United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *Thomsen v. Cayser*, 243 U.S. 66 (1917).

decade ago, there has been an ever-growing school of thought that the class action device itself is susceptible to more abuses than the conduct it was designed to cure. Four years ago, in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 555 (1974), the Court characterized the criticisms of Rule 23 as both "numerous and trenchant."[21] Although class actions "have sprouted and multiplied like the leaves of the green bay tree," *Eisen III*, *supra*, 479 F.2d at 1018, it is well documented that they are rarely, if ever, tried and that they serve as a formidable weapon to extract exorbitant settlements from defendants who cannot afford to run the risk of even a frivolous suit or to pay the defense costs connected therewith.[22] Even though a claim is completely without merit, the specter of class action recovery, no matter how remote, frequently induces businessmen and insurance companies to knuckle under to extortionate settlement demands rather than to risk a catastrophic judgment. *Herbst v. International Telephone & Telegraph Corp.*, *supra*, 495 F.2d at 1313.[23]

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[21] Among the more insidious effects of Rule 23 has been the tendency of some courts to dispense with proof of certain elements of a cause of action on an individual basis in order to achieve manageability. For example, there is some authority that class members need not prove individual reliance in § 10b cases. *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). Such rulings—and indeed the death knell doctrine itself—are violative of the mandate of the Rules Enabling Act, 28 U.S.C. § 2072:

> "Such rules shall not abridge, enlarge or modify any substantive right . . ."

[22] *See Report and Recommendations of the Special Committee of the American College of Trial Lawyers on Rule 23*, pp. 15-17 (1972); Handler, *Twenty-Third Annual Antitrust Review*, 71 COLUM L. REV. 1, 9 (1971).

[23] Judge Medina, in *Eisen III*, *supra*, at 1019, observed that class actions have been branded as "legalized blackmail," and commented that the expenses involved in such a lawsuit "have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits

The Third Circuit in *Hackett* correctly perceived that the fight over the death knell doctrine, which has now finally reached this Court, is a lawyers' fight rather than a clients' fight. In the instant case, the original certification of the class precipitated the emergence of New York counsel who specialize in this type of litigation. A ready-made class action, with its enticing prospect of huge attorneys' fees, naturally attracts the lawyers' attention, but the fact remains that respondents themselves stand to recover no more than $2650 in damages whether the case takes two days or two months to try. If respondents actually would have abandoned their claim after the class was disbanded, that decision admittedly would have been that of their lawyer (Apdx. 72-73). If respondents would walk away from their lawsuit because their attorney finds it economically undesirable to represent only them, then we, like the Third Circuit in *Hackett*, question whether the federal system should have been burdened with the case in the first place. We also are curious why Mr. Morrissey and the other large claimants have stayed on the sidelines and permitted respondents to carry the ball for them, and we suggest that the reason is very likely found in the death knell theory itself.

The death knell doctrine has not worked, will not work and, especially since *United Airlines*, is not needed. This case highlights the abuses which it encourages. An appeal is a matter of legislative grace, not of right, and Congress has specifically and necessarily restricted the business of the appellate courts. The death knell theory is a judicially-created exception to § 1291 and, as such, is incompatible with the letter and the spirit of *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 746

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of the claim." Judge Duniway, concurring in *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974), put it this way:

> "I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust."

(1976), where the Court rejected pleas for expansive readings of § 1291, saying that to accept such an invitation would be to "twist the fabric of the statute more than it will bear":

> "We believe that Congress, in enacting present §§ 1291 and 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a 'final decision' for appeal in every case, and has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship."

Interlocutory review of class action rulings should be undertaken only pursuant to the provisions of § 1292(b), where applicable, with the All Writs Act available for use in particularly egregious cases.

C. Even if the Death Knell Theory Is Appropriate in Some Instances, the District Court's Decertification Order in This Case Was Not Appealable.

The shortcomings of the death knell theory and the difficulties inherent in its application are pointedly illustrated by the Eighth Circuit's misuse of the doctrine in the instant case. The named plaintiffs' claim of $2650 is neither obviously viable nor patently insubstantial. Thus, as frequently happens in death-knell situations, the Court of Appeals was required to speculate on the issue of viability on an inadequate record.[24] In its un-

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[24] A plaintiff seeking to appeal under the death knell rule must bear the burden of developing a factual record in the district court showing that the death knell has indeed rung. *Share v. Air Properties G. Inc.*, 538 F.2d 279, 282 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976); *Jelfo v. Hickok Manufacturing Co.*, 531 F.2d 680 (2d Cir. 1976); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1148-49 (6th Cir. 1975); *Graci v. United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Gosa v. Securities Investment Co.*, 449 F.2d 1330, 1332 (5th Cir. 1971). "[C]ourts must be strict in making the plaintiff demonstrate that the order complained of truly means the death of his action." *Share v. Air Properties G. Inc., supra* at 282.

accustomed and inappropriate role as fact finder, the court ignored the only evidence appearing in the record on this issue —evidence which indicated that respondents themselves considered their claim to be individually viable and worthy of prosecution. In his deposition, respondent Cecil Livesay was specifically asked: "If the Judge were to decide that this case wasn't proper for a class action, would you proceed with it on your own?" His counsel objected to that question as "speculative," and respondent answered subject to that objection:

> "A. I guess—I couldn't give a yes or no. I would have to consult [my lawyer] and ask him his advice on your question. And if he said yes, then I would proceed, yes" (Apdx. 72-73).[25]

Furthermore, respondents, in an earlier petition for a writ of mandamus to the Eighth Circuit (before the initial class certification), represented that "regardless of whether the Court sustains or denies the class action determination herein, [plaintiffs] will at that time commence full and complete discovery on all issues" (Apdx. 106). Consistent with that assurance, respondents did in fact undertake extensive discovery on their individual claims after the district court revoked class certification (Apdx. 16).[26] Respondents have expressly conceded the viability of their claim and have avowed their devotion to

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[25] Since the decision is that of the attorney rather than the client, it is not improbable that the judgment whether to proceed will be influenced, if not controlled, by the availability *vel non* of a death-knell appeal. The death knell doctrine would thus be stood on its head in that the decision whether to pursue the individual claim will be governed by the availability of a death knell appeal, rather than *vice-versa*.

[26] The district court docket entries reproduced in the Appendix detail the activity in that court only through the filing of the Notice of Appeal on September 29, 1976. They reflect respondents' request for production of documents on September 22, but fail to show that respondents thereafter filed two sets of interrogatories and two additional requests for documents—all at a time when only their individual claim was pending.

its pursuit; therefore even if the death knell doctrine of *Eisen I* were applied, the decertification order could not be deemed "final" or appealable. *Bowe v. First of Denver Mortgage Investors*, 562 F.2d 640 (10th Cir. 1977).

This case also serves to demonstrate why, if some sort of death knell rationale is to receive the imprimatur of this Court, such a rule must, at a minimum, contain the safeguards built into the doctrine by the Ninth Circuit. That Court has modified the *Eisen I* concept by ruling that an order refusing class-action certification cannot be appealed as "final" unless the plaintiff affirmatively establishes that *no member* of the proposed class—whether a named plaintiff or otherwise—possesses an individually viable claim. In *Share v. Air Properties G. Inc.*, 538 F.2d 279, 283 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976), the Ninth Circuit, after correctly holding that the death knell theory is not properly considered an off-shoot or a corollary of the collateral order doctrine, enunciated its sharply curtailed version of the death knell rule:

> "Therefore, we hold that, if after appropriate proceedings and findings with respect to whether any member of the purported class possesses a cause of action which is viable if brought individually, it appears such a member exists, an order of the trial court denying class certification does not constitute an appealable order."

The court in *Share* refused to subscribe to the view that the existence of *any* nonviable claim would sound the death knell and dismissed the individual plaintiff's appeal because it appeared that another individual had suffered a loss in excess of $17,000.

In its opinion in this case, the Eighth Circuit purported to apply the *Share* formula but seriously misapplied it. The appellate panel appeared to read *Share* as requiring that the individually viable claimants be "actively engaged" in the litigation

in order to defeat appealability (Cert. Pet., p. A-9 n.2). The Eighth Circuit's perception of *Share* was clearly incorrect, as evidenced by the subsequent Ninth Circuit opinion in *Hooley v. Red Carpet Corporation*, 549 F.2d 643 (9th Cir. 1977). In *Hooley*, the court refused to limit or revise its holding in *Share*, and in fact reaffirmed it. Emphasizing that the purpose of the death knell theory is not to reward the individual named plaintiff or his lawyer but to make sure that ultimate review of the class action question is not foreclosed by the certification ruling, the court stated, *l.c.* 645:

> "The death knell doctrine is not designed to facilitate immediate review of refusals to certify an action as a class action. It is to make certain that the refusal to certify does not deprive the members of the purported class of an opportunity for review in due course of the refusal on appeal. All opportunity for such review is destroyed if the refusal will have the practical effect of terminating all effort by anyone to assert the particular cause of action involved and to preserve for review on appeal the allegedly erroneous refusal to certify. To determine whether such destruction has occurred requires an examination not limited to named plaintiffs."[27]

Again, the wisdom of the restrictions imposed by the Ninth Circuit is reflected in the instant record. As has been mentioned, plaintiffs' original counsel identified at least four of his own clients having individual claims ranging from $18,000 to $500,000. Yet respondents, with their loss of $2650, have been selected as standard-bearers for the class. The Eighth Circuit, by mindlessly applying the original *Eisen I* death knell concept, by misapplying the *Share-Hooley* rule, and by ignoring the facts in the record, has rewarded respondents' counsel for his predecessor's maintenance of this action solely in the name of his client who had suffered the least from petitioners' alleged mischief.

[27] Of course, even the modified doctrine developed by the Ninth Circuit has been rendered expendable by the intervening decision in *United Airlines, Inc. v. McDonald*, as discussed above.

Whether the appealability question is examined under the original Second Circuit formula of *Eisen I* or under the modified view of the Ninth Circuit in *Share* and *Hooley*, the death knell simply has not rung. The Court of Appeals, therefore, should have dismissed the appeal.

II. The Court of Appeals Exceeded the Proper Scope of Its Authority in Reversing the District Court's Decertification Order.

If, despite the foregoing argument, this Court should adopt the death knell doctrine and approve the Eighth Circuit's utilization of it in this case, it will then be incumbent upon the Court to face the issue left unresolved last Term in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977), where the Court said:

> ". . . we do not reach the question whether a Court of Appeals should ever certify a class in the first instance."

In *Rodriguez*, three Mexican-American truck drivers filed suit challenging their employer's "no transfer" policy which, when considered in conjunction with the seniority system existing in the collective bargaining agreements between the company and the unions, was said to constitute racial and ethnic discrimination. In spite of an allegation in their complaint that they were proceeding on behalf of a class, the plaintiffs did not move before trial to have the action certified, and the district court made no certification ruling. When the case ultimately went to trial, the court dismissed the class action allegations. After hearing the evidence, the court also rejected the plaintiffs'

individual claims, holding, *inter alia*, that they were not qualified for the jobs they sought and, therefore, that they had failed to make a *prima facie* case of discrimination.

On appeal by the individual plaintiffs, the Court of Appeals for the Fifth Circuit (a) reversed the class action determination, (b) certified a class and (c) imposed class-wide liability on the company and the union on the basis of the proof adduced at trial. The court discounted the individual plaintiffs' failure to move for certification before trial, reasoning that the responsibility for adjudicating the class question rested on the shoulders of the district judge, whether or not the named plaintiffs sought certification.

This Court, in a unanimous opinion, reversed the judgment of the Fifth Circuit and concluded that "the Court of Appeals plainly erred in declaring a class action and in imposing upon the petitioners classwide liability." *Id.* at 403. It ruled that the appellate court had paid insufficient heed to the plaintiffs' failure to request class certification and observed that "it was evident by the time the case reached that Court that the named plaintiffs were not proper class representatives under Fed. Rule Civ. Proc. 23(a)." *Ibid.* One of the "strong indications" that the plaintiffs did not adequately represent the class was their failure to move for class certification prior to trial. The Court of Appeals was chastised for its usurpation of the trial court's discretionary function and for its failure to recognize that even in cases involving class-wide racial or ethnic discrimination "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." *Id.* at 405.

The instant case is even more aggravated than *Rodriguez*. Here the Court of Appeals reversed the district court's order disestablishing the class action, and in effect entered a class certification order, without any analysis whatsoever of whether the requirements of Rule 23 had been met in the first place or

whether the revocation of class certification was sustainable on any other ground appearing in the record. The Eighth Circuit, on the basis of a cold record, simply substituted its judgment for that of the district judge who had been living with the case for more than three years.

The Court of Appeals disregarded the fact that petitioners' Motion to Decertify the class action had advanced a number of separate grounds in support of the requested decertification, including, *inter alia*: (1) inadequacy of respondents as class representatives; (2) delay in moving for class certification and in requesting a certification hearing; (3) lack of prosecution and delay in requesting discovery of names and addresses of class members after certification had been granted; and (4) manageability problems created by the predominance of individual questions over class questions, particularly as regards the issues of reliance, causation and the statute of limitations (Apdx. 201-04).

The district court upheld petitioners' contention that the protracted delay in seeking the identify of the class members was unjustifiable and evidenced a lack of diligent prosecution on the part of respondents as class representatives. The court thus had no occasion to address the other issues raised by the Motion to Decertify. The Court of Appeals, disagreeing with the lower court on the stated ground of lack of prosecution, merely recertified the class action without considering the other issues raised by petitioners in their Motion, thereby contravening the well-accepted principle that an order of a lower court should be affirmed on appeal if it is sustainable on any ground appearing in the record. *United States v. New York Telephone Co.*, — U.S. —, 46 U.S.L.W. 4033, 4035 n. 8 (1977); *Helvering v. Gowran*, 302 U.S. 238 (1937); *Carpenters' District Council v. Brady Corp.*, 513 F.2d 1 (10th Cir. 1975); *Sapp v. Renfroe*, 511 F.2d 172 (5th Cir. 1975).

We submit that the Court of Appeals exceeded its authority in (a) substituting its judgment for the district court on the

question of lack of prosecution, (b) recertifying the class without considering the numerous other factors bearing on the suitability of respondents as class representatives, and (c) recertifying the class without analyzing whether the remaining requirements of Rule 23 were met or whether the case had been properly certified for class action treatment in the first instance.

A. The Court of Appeals Exceeded Its Authority in Reversing the Decertification Order on the Stated Ground of Lack of Prosecution by Respondents.

The machinery of Rule 23 has been entrusted to the sound discretion of the district judge who, after all, is the person who must live with this sometimes unwieldy and hydra-headed monster known as the class action. The initial determination of whether a case should proceed on a class basis is discretionary with the district court and must take account of a number of factors. *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975); *Fendler v. Westgate-California Corp.*, 527 F.2d 1168 (9th Cir. 1975). That important decision is often facilitated immeasurably by an in-person observation of conditions and participants; it is generally unsuited to adjudication on the basis of an abstract, impersonal record. In *City of New York v. International Pipe and Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969), the court, emphasizing the problems associated with a class certification ruling, said:

> "This issue should not be decided in an abstract or academic manner but rather in a practical and realistic way by a trial judge who has knowledge of the actual problems presented in the courtroom by these multi-plaintiff, multi-defendant cases."

An appellate court may overturn a class action ruling only upon a showing that the trial court abused its discretion. *Wright*

v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114 (5th Cir. 1975); *Rutledge v. Electric Hose and Rubber Co.*, 511 F.2d 668 (9th Cir. 1975). Here, by contrast, the appellate court simply substituted its judgment for that of the trial judge and, in so doing, disrupted the balance built into Rule 23 by its authors and restored by this Court in *Rodriguez*.

The district court's finding of respondents' failure to diligently prosecute this action was made against the background of the following chronology:

Date	Event
July 27, 1973	Complaint filed (Apdx. 1).
April 11, 1974	Respondents first moved for class certification (Apdx. 5, 85).
November 18, 1974	Respondents first requested evidentiary hearing on class certification (Apdx. 108).
June 19, 1975	District court ordered that case may proceed as class action (Apdx. 11, 169).
October 23, 1975	District court directed respondents to conduct discovery to ascertain names of members of class (Apdx. 13, 186).
April 20, 1976	Respondents sought list of Punta Gorda securities purchasers by telephone communication with counsel for Petitioner Punta Gorda Isles, Inc. (Apdx. 215).
April 21, 1976	Respondents were advised that requested list was not available

and that it was inappropriate in any event (Apdx. 215).

July 20, 1976 — Respondents first filed a request for production of documents seeking names and addresses of prospective class members (Apdx. 14, 200).

The record before the district court thus reflected that respondents had originally delayed for nine months in seeking a class action determination, a factor specifically recognized by this Court in *Rodriguez* as bearing heavily upon their suitability as class standard-bearers. Although the district court apparently did not consider this original delay as *per se* disqualifying to respondents, their subsequent unexcused dilatoriness in failing for nine additional months after the lift of the stay on discovery to seek elementary and critical information as to the identity of the class members was more than the trial judge could tolerate. Although it may be true, as noted by the Court of Appeals, that not all of the three-year delay between the filing of the complaint and the requested discovery of the names of class members was attributable to respondents, it is simply untenable to assert that the district judge abused his discretion in finding "that there has been a lack of prosecution on the part of the plaintiffs as class representatives." The district court's action in decertifying the class was long overdue and remarkably restrained, and the Court of Appeals overstepped the bounds of judicial scrutiny in second-guessing the judgment of the trial judge.[28]

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[28] In *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), the Court reaffirmed the discretion of the trial judge to purge his docket of cases which are not diligently pursued. If such a rule pertains where the result is a dismissal of the plaintiff's claim with prejudice, the instant case is *a fortiori* because respondents' individual claim was untouched by the challenged order.

B. The District Court's Decertification Order Was Also Sustainable on the Ground That Respondents Were Not Adequate Representatives of the Class for a Number of Other Reasons Appearing in the Record.

In order to ensure compliance with the mandatory requirements of Rule 23(a)(4), the court in every class action must "undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation . . ." *Susman v. Lincoln American Corp.*, 561 F.2d 86, 89 (7th Cir. 1977); *National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340 (D.C. Cir. 1976), *cert. denied*, — U.S. —, 53 L.Ed. 2d 270 (1977); *Rutledge v. Electric Hose and Rubber Co., supra.* In *Eisen II*, 391 F.2d 555, 562 (2d Cir. 1968), the court stressed the importance of the credentials of the named plaintiffs:

> "Traditionally, courts have expressed particular concern for the adequacy of representation in a class suit because the judgment conclusively determines the rights of absent class members. See *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Of course, understandably, the standards for representation under the old spurious class action were not as rigorously enforced, due to the minimal *res judicata* effects given to the judgments in these suits. *See Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). However, as a result of the sweeping changes in Rule 23, *a court must now carefully scrutinize the adequacy of representation in all class actions.*" (Emphasis supplied.)

One of the principal criteria for measuring the suitability of the would-be class champion is the vigor with which he asserts and prosecutes the claims of the class. *Senter v. General Motors Corporation*, 532 F.2d 511 (6th Cir. 1976); *Fendler v. Westgate-California Corp., supra; Gonzales v. Cassidy*, 474 F.2d 67

(5th Cir. 1973). As pointed out above, delay in moving for class certification, or in otherwise protecting the interests of the class, bears directly upon the adequacy evaluation. *East Texas Motor Freight System, Inc. v. Rodriguez, supra.* But in the instant case, that delinquency hardly stands alone. To the contrary, respondents' leadership was tainted from the outset by a conflict of interest of their original attorney from which they never recovered. When the suit was filed, it seemed strange that the underwriters, who had managed the Punta Gorda public securities offering, were conspicuously missing from the lineup of defendants. Information soon surfaced that respondents' attorney also represented one of those underwriters and naturally provoked a question of possible divided loyalties. In order to thwart an airing of this issue, respondents stalled the evidentiary hearing on the class action certification. Rather than trying to dispel the doubts raised about the conflict of interest, respondents sought further to entrench themselves as class representatives by seeking discovery on the merits before the class-action question was adjudicated (Apdx. 96). That request was denied, and the district court ordered that the issue of respondents' adequacy, among others, should be fully explored in an evidentiary hearing (Apdx. 10, 108).

The hearing, held on December 30, 1974, betrayed respondents' intensive efforts to block exploration of the conflict-of-interest problem. The evidence revealed that no meaningful investigation or good-faith determination had been made by respondents' counsel as to the necessity, desirability or wisdom of joining the underwriters, and the only feasible explanation for this infirmity was counsel's conflict of interest (Apdx. 153-60). Respondents contended that a thorough investigation of the case had preceded the filing of their complaint, but the evidence showed that the entirety of that effort had consisted of counsel's casual discussions with two officers of the potential underwriter-defendants (Apdx. 156-60). Even the predictably self-serving comments by those officials about their own diligence, however,

suggested that the underwriters should be named as defendants in any lawsuit which might be filed (Apdx. 157-59); and neither respondents nor their attorneys were able to offer any cogent explanation for not joining the underwriters (Apdx. 71, 160, 182-83).[29]

Although respondents and their counsel stoutly denied any conflict of interest, there was little doubt that respondents' decision not to sue the underwriters was prompted not by an impartial assessment of the merits of the claim but by their attorney's loyalty to one of those underwriters. Accordingly, it was no surprise when the district court issued an order declaring that counsel's conflict of interest and apparent violations of Disciplinary Rule 5-105(A) and Ethical Considerations 5-14 and 5-15 of the Code of Professional Responsibility cast a shadow on the adequacy of respondents' representation of the class (Apdx. 170). While the court certified the case as appropriate for class action treatment, it ordered respondents' original counsel to show cause why he should not be enjoined from representing the class. *Cf. Susman v. Lincoln American Corp., supra.* Rather than challenging the court's findings or attempting to explain his conduct, counsel simply withdrew from the action (Apdx. 173-74).

Upon the appearance of respondents' new counsel on June 30, 1975, the district court promptly inquired what action they proposed to take regarding the underwriters (Apdx. 179). Apparently because respondents had concluded that the statute of limitations had expired on claims against the underwriters while their first counsel maneuvering to suppress his conflict-

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[29] We do not suggest that the underwriters should be defendants in this lawsuit or that there is any merit to a claim against the underwriters or, for that matter, against any of the petitioners. Rather, we believe that all of respondents' claims are spurious and will not survive the scrutiny of a trial on the merits. The fact remains, though, that there is absolutely no basis, other than the conflict of interest, to justify or explain respondents' variation in treatment between the underwriters and all other participants in the Punta Gorda offering.

of-interest problem, they made no response to the district court's inquiry.[30] Instead of acknowledging that their inaction had extinguished a potential claim of the class, they merely stated that no additional defendants would be named "at the present time," thereby conveying the misleading impression that a suit against the underwriters was still under consideration and a real possibility (Apdx. 183).

When the district court ultimately realized that respondents had not been completely candid and that the statute of limitations might have expired during their attorney's concerted effort to hide his divided loyalties, it expressed serious reservations about their willingness and ability to protect the interests of the class. On October 23, 1975, the court issued a directive to respondents either to join the underwriters or to proffer some valid reason for not doing so. In the course of that order, the district judge manifested his distress over the seeming inadequacy of respondents' leadership:

> "The Court is presently concerned with plaintiffs' adequacy as representative of the class. . . . The presence of new counsel does not in itself erase the shadow of inadequate representation previously cast. . . . Even if the two absent underwriters are joined, the question of plaintiffs' adequacy as representatives of the class remains. Plaintiffs have shown a lack of complete willingness to protect the interests of *all* the members of the class throughout the course of this action. . . . To decertify this as a class action at this time based on the inadequacy of representation, however, may jeopardize potentially valid claims held by absent class members. Notice, therefore, should be sent out to the class pursuant to F.R.C.P. 23(c)(2). In this manner, the members of the class will be on notice as to the disposition of the present action and will have the opportunity to choose for themselves if they wish to be bound by the judgment that will ensue. The notice will specify first that members may exclude themselves from the class upon request, F.R.C.P. 23(c)(2)(A); that if the class member does not opt out then he will be bound by the judgment entered, F.R.C.P. 23(c)(2)(B); that if the class member does not exclude himself he may enter an appearance through counsel, F.R.C.P. 23(c)(2)(C); *and that the court requests petitions for appointment of new class representative or in the alternative, intervention by class members,* F.R.C.P. 23(d)(2). To explain the Court's request for petitions or intervention, sufficient facts of the case will be given in the notice" (Apdx. 187-88; emphasis added).

[30] In an affidavit filed with the district court on August 16, 1976 (Apdx. 15), respondents' current counsel stated that upon review of the applicable law they "had determined that any claims against underwriters had been barred by the statute of limitations prior to the date upon which present counsel entered their appearance . . ."

This language left little room for speculation as to the course the court intended to pursue. Respondents were aware that this order, if implemented, would inevitably eliminate them as class representatives. If the full story of respondents' mismanagement of the lawsuit were disclosed to the other class members, respondents would be quickly dethroned as class champions. Therefore, instead of abiding by the court's October 23rd order, respondents sought to solidify their position by seeking discovery on the merits while opposing and delaying implementation of the order. They submitted a form of proposed notice which omitted any reference to the appointment of a new class representative, and they attempted to formulate a notice which would not have created any uproar about their behavior (Apdx. 212-14). They also tried to nullify the anticipated effect of distribution of the notice on their control over the lawsuit by proposing that class members should be prohibited from communicating with the district court. Specifically, they asked the court to instruct class members to send "communications commenting upon the conduct of this action"

to their attorneys and not to the district court (Apdx. 199, 214). This was nothing but a transparent attempt to impede the district court's appraisal of the need or desire for a new class representative.

At the same time, while striving to delay and dilute the notification to the class, respondents ignored that portion of the October 23rd order requiring that "discovery shall proceed as to finding the names and addresses of the class members" (Apdx. 189). In spite of this clear directive, respondents did not initiate even informal attempts to obtain this essential data until April 1976 and did not institute discovery procedures under the Federal Rules until July 20, 1976, some nine months after the entry of the order. They offered no excuse for this intolerable procrastination other than to say that they generally preferred to postpone their discovery until after the form of class notice had been settled. The real, albeit unspoken, reason for the delay was respondents' reluctance to hasten the sending of a form of notice which would likely undermine their position as leaders of the class and produce a new and more diligent class representative with, of course, his own counsel.

Considered in its overall context, the district court's decertification ruling, though specifically couched in terms of failure to prosecute, also reflected the court's repeatedly voiced disenchantment with respondents' representation of the class.[31] Respondents got off on the wrong foot because of their original counsel's conflict of interest and their subsequent attempts to conceal the consequences of that conflict. The tardiness in seeking names of the class members, when piled on top of the original delinquency in requesting class certification, displayed

[31] The Court of Appeals seemed to recognize that the failure to prosecute did not exist in a vacuum but was merely a facet of the trial court's concern about respondents' adequacy (Cert. Pet., p. A-11 n. 6). Nonetheless, the appellate court unaccountably refused to consider the other factors bearing on the adequacy question.

an insensitivity and infidelity to the high standards demanded of class leaders. The district court exhibited commendable patience and tolerance with respondents but finally, exasperated by their behavior and convinced of their inability to lead the class, decertified the class on September 1, 1976. That judgment is sustainable for the expressed reason of lack of prosecution, as well as for the implicit and interrelated reason of respondents' overall inadequacy as class representatives.

C. The Court of Appeals Erred in Recertifying the Class Without Determining Whether It Was Properly Certified in the First Place.

The judgment of the Court of Appeals illustrates yet another of the fundamental flaws in the death knell theory. When the district court originally ruled that the case should be maintained as a class action, petitioners believed that order to be erroneous for a number of reasons but were foreclosed from seeking immediate review of that decision by the final judgment rule. But upon decertification of the class, the Court of Appeals entertained respondents' appeal and reinstated the class action without any analysis of the propriety of the district court's initial class action determination. Hence, the one-sidedness of the death knell doctrine has permitted respondents to obtain review of an order adverse to them while denying petitioners any appellate consideration of the propriety of the original class action designation.

One of the principal defects in the district court's initial class action determination stemmed from the inadequacy of respondents' representation of the class. It was clear error for the Court of Appeals to recertify the class without analyzing that issue. In addition, the class should never have been certified because the individual questions—particularly those involving reliance, causation and the statute of limitations—predominated over the

class questions. For example, claims under §§ 11 and 12 of the 1933 Act must be commenced within one year of discovery, and since this action was not instituted until 15 months after the Punta Gorda offering, each member of the class would be required to prove his own individual compliance with the limitations requirement. Moreover, subsequent developments in this Court and in the Eighth Circuit have eroded much of the rationale underlying the class certification and cast serious doubt upon the validity of the district court's original conclusion. See ***Blue Chip Stamps, Inc. v. Manor Drug Stores,*** 421 U.S. 723 (1975); ***Ernst & Ernst v. Hochfelder,*** 425 U.S. 185 (1976); ***Harris v. American Investment Company,*** 523 F. 2d 220 (8th Cir. 1975), ***cert. denied,*** 423 U.S. 1054 (1976).

Another essential and inextricably intertwined component of a class action which is wanting in this case is manageability, as required in Rule 23(b)3(D). The Court of Appeals sent the case back to the district judge without even pausing to consider whether it could be feasibly handled on a class action basis. The necessity of individualized investigation of the reliance, causation and limitations questions could very well turn the trial of this case into a trial by ordeal.[32]

The Eighth Circuit ignored the admonition of this Court in *Cohen v. Beneficial Industrial Loan Corporation, supra,* 337 U.S. at 546, that "appeal gives the upper court the power of review, not one of intervention." The Eighth Circuit has indeed "intervened" and has effectively certified a class action in the first instance without any consideration of the stringent requirements of Rule 23. The Court of Appeals has severely, unnecessarily and unwisely interrupted an on-going lawsuit. Such interlocutory intervention is ordinarily abhorrent enough, but when the stakes are as high as those set by Rule 23, the

[32] In fact, the district court had announced its intention to reconsider its earlier ruling that individual issues of fact did not predominate (Apdx. 189).

courts must be especially faithful to the strictures of that Rule because of the potential for abuse lurking in class actions, particularly in securities cases. *See Blue Chip Stamps, Inc. v. Manor Drug Stores, supra.* The superficial approach of the Eighth Circuit here is a vivid testimonial to the soundness of the final judgment rule and to the undesirability of piecemeal review of class action questions. The judgment of the Court of Appeals is at odds with the mandate of *Rodriguez* that "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." The district court's decertification order was not appealable, but even assuming otherwise, the Eighth Circuit has far exceeded the proper scope of its authority.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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January 9, 1978

ADDENDUM

ADDENDUM

TITLE 28, UNITED STATES CODE

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 1292. Interlocutory decisions

* * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is

superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether

or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S.

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OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri are not officially reported

but are set forth at pages A-6 to A-8 of the Petition for Writ of Certiorari filed in No. 76-1837 by Petitioners Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S. (hereinafter referred to as the "Punta Gorda Isles petitioners"). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 550 F.2d 1106 and reproduced at pages A-9 to A-21 of that Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1977. Petitioners' timely petition for rehearing was denied on March 28, 1977. Separate Petitions for Writs of Certiorari were filed on June 23, 1977, by the Punta Gorda Isles petitioners (No. 76-1837) and by the other defendant, Coopers & Lybrand (No. 76-1836), and were granted on November 14, 1977, at which time the cases were consolidated for briefing and argument. 46 U.S.L.W. 3332.[1]

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves Sections 1291 and 1292 of Title 28, U.S.C., and Rule 23 Fed. R. Civ. P., all of which are set forth in their entirety in the Addendum to this brief, *post*.

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[1] On December 5, 1977, the Court granted certiorari in No. 77-560, *Gardner v. Westinghouse Broadcasting Company* and set that case for oral argument in tandem with the instant matter. 46 U.S.L.W. 3373.

QUESTION PRESENTED

Did the Court of Appeals err in deciding that the order of the District Court determining that this action could not be maintained as a class action was a "final decision" that could be appealed under 28 U.S.C. § 1291?

STATEMENT OF THE CASE

The complaint in this action was filed in the United States District Court for the Eastern District of Missouri on July 27, 1973 (A1). The complaint asserts claims based on alleged violations of Sections 11, 12(2), and 17 of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5. The claim asserted on behalf of the named plaintiffs is for approximately $2,650 plus interest; the complaint also asserts claims on behalf of the class described therein for an unspecified amount. The jurisdiction of the District Court is based on Section 22 of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934 (A23-35).

On December 30, 1974, at the hearing on the plaintiffs' motion for an order that the action could proceed as a class action, the plaintiffs offered evidence that the class included, *inter alia*, one member with a claim of approximately $500,000 and another with a claim of approximately $140,000, both of whom expressed a willingness to help pay the expenses of the litigation. (A151-153).

On June 19, 1975, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the District Court entered its order determining that the action could proceed as a class action (A11).

On September 1, 1976, again pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the District Court entered

its order determining that the action could no longer be maintained as a class action by the named plaintiffs (A207).

The plaintiffs did not seek to appeal that order as an interlocutory order pursuant to 28 U.S.C. § 1292(b). Rather, they based their appeal to the United States Court of Appeals for the Eighth Circuit on 28 U.S.C. § 1291, which applies only to "final decisions" (A208). The defendants filed a timely motion to dismiss the appeal for lack of jurisdiction, asserting that the order of the District Court was not a final decision (A210).

The United States Court of Appeals for the Eighth Circuit found as a matter of fact that the individual claim of the plaintiffs was so small that they would not continue to prosecute the case unless the District Court's order was reversed. On the basis of this finding, it concluded that the order was a "final decision" and that it therefore had jurisdiction to hear the appeal (550 F.2d 1106, 1110).

On the merits of the case, the Court of Appeals held that the District Court had abused its discretion in determining that the action could not be maintained as a class action, and it reversed the District Court's order (550 F.2d 1106, 1110-1113).

The defendants' motion for rehearing or rehearing *en banc* was denied on March 28, 1977 (A19).

Separate petitions for certiorari were filed on June 23, 1977, by Coopers & Lybrand (No. 76-1836) and the other defendants (No. 76-1837). On November 14, 1977, the petitions were granted and the cases consolidated.

SUMMARY OF ARGUMENT

In this case the District Court ordered that the action could no longer be maintained as a class action by the named plaintiffs. The Court of Appeals held that order was a "final decision" that could be appealed under 28 U.S.C. § 1291. In so doing it adopted the "death knell" doctrine; *i.e.*, it ruled that an order that an action cannot be maintained as a class action is "final" within the meaning of 28 U.S.C. § 1291 if the Court of Appeals determines that the plaintiff will not continue to prosecute the action unless the order is reversed.

The arguments as to why this Court should reject the death knell doctrine are fully developed in the brief filed by the other petitioner in this consolidated case, Coopers & Lybrand. These petitioners endorse and adopt those arguments, and they will not be repeated at length in this brief. This brief supplements those arguments by arguing that: (1) Even if the Court does not reject the death knell doctrine, it should nevertheless reverse the judgment of the Court of Appeals in this case because that court failed (a) to require a hearing on the issue of finality, and (b) to consider all of the factors relevant to a determination of finality; and (2) The death knell doctrine should be rejected as unworkable and unnecessary, because if it were properly applied it would add yet another layer of procedural complexity to the already cumbersome class action device, and because 28 U.S.C. § 1292(b) provides a more effective procedure for appellate review of class action decisions.

Under the death knell doctrine, the finality of a class action order is regarded as a question of fact. A necessary concomitant of the doctrine, therefore, is a procedure by which the question of finality can be answered. Fairness and judicial efficiency require that procedure to include a hearing by the district court at which the parties could offer evidence on the factual questions.

In this case the parties were given no opportunity to discover or to offer evidence on the issue of finality. The Court of Appeals made its factual determination of finality on the basis of a record directed to other issues, a record that does not contain all of the evidence relevant to the finality issue. Therefore, even if the Court does not reject the death knell doctrine, it should rule that the Court of Appeals erred by not requiring a hearing on the finality issue.

The death knell doctrine requires the Court of Appeals to predict the future conduct of the plaintiff. In this case the Court of Appeals unduly restricted its inquiry into finality and it failed to consider several factors relevant to the finality issue. If the Court does not reject the death knell doctrine, it should nevertheless rule that the Court of Appeals erred in this case by not considering all of the factors that are involved in any realistic attempt at a prediction by the court of whether the action will continue to be maintained.

If the death knell doctrine were to be adopted, fairness and judicial efficiency would dictate that a hearing on the issue of finality be held by the district court prior to an appeal to the Court of Appeals. The addition of this procedural complexity to the already cumbersome class action devise is unnecessary (and unwarranted by statute), because in those cases in which an appeal is justified, it can be more efficiently accomplished under 28 U.S.C. § 1292(b). The Court, therefore, should reject the death knell doctrine.

ARGUMENT

The other petitioner in this consolidated case, Coopers & Lybrand, has filed a comprehensive brief in which the arguments why the death knell doctrine should be rejected are fully developed. This brief does not attempt to duplicate those arguments or to review the authorities there discussed. Rather, these petitioners adopt those arguments and seek in this brief only to supplement them.

I

Even if the Court Does Not Reject the Death Knell Doctrine, It Should Rule That the Court of Appeals Erred in Determining That the Order of the District Court Was a "Final Decision" Because: (A) The Parties Were Not Afforded an Opportunity to Offer Evidence on That Issue; and (B) The Court of Appeals Did Not Consider All Factors Relevant to Finality.

A. **The parties were not afforded an opportunity to offer evidence on the issue of finality.**

An order determining that an action cannot proceed as a class action is made "conditional" by the express provision of Rule 23. In terms of its legal effect it cannot be a "final decision." Those Courts of Appeals that have adopted the "death knell" doctrine, however, attempt to measure the finality of such an order by its practical effect rather than by its legal effect. In so doing, they convert the issue of finality from a question of law to a question of fact.

If under the death knell doctrine finality (and therefore appealability) is a question of fact, a necessary concomitant of the doctrine is a fair and efficient procedure by which that question can be resolved. With respect to questions of fact, procedural

fairness usually requires an opportunity to offer evidence and to attempt to discover evidence.

The procedure used by the Court of Appeals in this case provided neither. None of the issues presented to the District Court required evidence on the finality issue, and the parties never had an appropriate opportunity to discover or to offer evidence on that issue. While there may be some evidence in the record that is relevant to the finality issue, the presence of that evidence in the record is purely fortuitous: it was offered for other purposes. There is no reason to believe that the record contains all of the evidence relevant to the finality issue that the parties would have offered if they had been given an appropriate opportunity. Nor was there any discovery directed to the finality issue.

For example, in determining the finality issue in this case the Court of Appeals considered only "the amount of the plaintiffs' claim in relation to their financial resources and the probable cost and complexity of the lawsuit." (550 F.2d 1106, 1109). However, if other members of the class were willing to assist in financing the litigation, that fact would be relevant to the decision on the issue of finality.[2] *Hooley v. Red Carpet Corp. of America*, 549 F.2d 643 (9th Cir. 1977); *Share v. Air Properties G. Inc.*, 538 F.2d 279 (9th Cir.), *cert. denied sub nom. Woodruff v. Air Properties G. Inc.*, 429 U.S. 923 (1976). The

[2] The record in this case contains a strong indication that other members of the proposed class were in fact willing to assist in financing the litigation; plaintiffs' former counsel so testified (A151-153). Nor was there any evidence that those members of the class ever changed their minds. Nevertheless, the Court of Appeals concluded that "the record reveals only that certain class members had indicated a willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' new counsel" (550 F.2d 1106, 1109 n. 2).

The court's conclusion was, perhaps, based on a statement in a brief of the plaintiffs-appellants:

> "Present counsel have represented the Livesays since June 30, 1975 and have not been retained to represent any other persons described by plaintiffs' former counsel. Plaintiffs' present counsel know of no class member who has stated a willingness to intervene in this action."

(Reply Brief for Appellants-Petitioners, pp. 5-6 in the Court of Appeals).

This statement is unsworn and was not subject to cross-examination. Moreover, it does not negate a continued willingness to assist in financing the litigation by those persons identified by plaintiffs' former counsel.

procedure (or, perhaps more precisely, the lack of procedure) approved by the Court of Appeals in this case did not permit the full development of the evidence concerning the continued willingness of other members of the class to finance the litigation. The defendants never had the opportunity to discover and to offer evidence on that issue.

The Court of Appeals did not have the benefit of a record directed to the issue of finality. Instead, it relied on bits and pieces of evidence scattered through the record, evidence that had been offered on other issues. (550 F.2d 1106, 1110 n.5).

The death knell doctrine, as applied by the Court of Appeals in this case, is not only procedurally unfair, but it also involves an inefficient use of judicial manpower and an improper allocation of judicial functions. The doctrine requires an appellate court to make the initial finding of fact on the issue of finality. Finality, considered as a question of fact, is a complex issue; it is, in essence, a prediction of whether the plaintiff will continue the litigation if the district court's order is not reversed. Any realistic approach to this prediction would require consideration of many factors. As more fully developed below, the list of relevant factors might include: the plaintiff's estimate of the probability of success on the merits; the possibility of assistance by other members of the class; the willingness of plaintiff's counsel to advance the costs and expenses of litigation; and the amount of trial preparation and discovery that had been accomplished before the decision on the class action issues. In

this case, and in most cases, the record developed without a hearing on the question of finality simply does not contain sufficient evidence concerning these factors for an appellate court to make a realistic and intelligent prediction of finality. An appellate court should not speculate about these factors in determining whether or not it has jurisdiction to hear an appeal from a district court order denying class action status.

Moreover, for the Court of Appeals to make an initial factual decision distorts the judicial process by depriving the parties of the right to effective appellate review of that decision. A decision on factual issues made initially by the district court is subject to review by the Court of Appeals. When the Court of Appeals is the initial fact-finder, the right of effective appellate review is denied. It is not the function of The Supreme Court of the United States to afford the only forum for review of initial findings of fact by the Courts of Appeals.

The importance of a procedure that provides appropriate appellate review on the finality issue is illustrated by the fact that the record in this case contains compelling evidence that other members of the proposed class were in fact willing to assist in financing the litigation; despite this evidence the Court of Appeals erroneously found that plaintiffs' change of counsel terminated the role of those other class members.[3]

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[3] See note 2, *supra*. These petitioners submit that the Court of Appeals also made other erroneous factual determinations. For example, in determining that the respondents (plaintiffs below) were not dilatory in seeking to discover the names and addresses of the class members, Judge Stephenson stated:

> "The third period of time mentioned in the decertification order is the period from the district court order allowing discovery of the names and addresses of class members until plaintiffs first sought to discover that information. This period runs from October 23, 1975, to April 20, 1976, when plaintiffs first requested Punta Gorda's counsel to furnish the names and addresses of the initial registered owners of the securities. Defendants contend that because plaintiffs have offered no compelling excuse for failing to request this information more promptly, this delay *ipso facto* justified the district court's finding that plaintiffs are inadequate representatives. We disagree.
>
> "We begin by noting that there has been no showing that plaintiffs' failure to request production of this information at an earlier date has prejudiced the class members. The notices to the class members could not have gone out until the final form of notice was approved by the court, which did not occur until April 9, 1976. Eleven days later, plaintiffs' attorney telephoned counsel for Punta Gorda and requested that Punta Gorda furnish the names and addresses of the initial registered owners of the securities in question. In a letter dated August 4, 1975, counsel for Punta Gorda had agreed to furnish this information. However, in response to the telephone call, *counsel for Punta Gorda wrote a letter to plaintiffs' counsel refusing to furnish this information.* In these circumstances we cannot agree that plaintiffs were dilatory in seeking the names and addresses of potential class members. They had every right to expect that defendants would promptly furnish this information. To hold that plaintiffs are inadequate class representatives because they failed to anticipate defendants' eventual objections to discovery would be tantamount to saying that class representatives must be gifted with prescience. This we decline to do." 550 F.2d 1106, 1111-1112 (Italics added).

The letter to which Judge Stephenson refers is reproduced in the Appendix at page 215. *That letter did not refuse to produce the requested information.* It did no more than notify the plaintiffs of

In short, the procedures of the Courts of Appeals are ill-adapted to make the initial finding on the finality issue correctly and efficiently. To have the Court of Appeals make the initial finding on finality deprives the parties of effective appellate review of the issue.

A better allocation of judicial functions than that employed by the Eighth Circuit—and a more efficient use of judicial manpower—was suggested by the Court of Appeals for the Fifth Circuit in *Gosa v. Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971). There, the court suggested that the trial court should hold a hearing and make the initial finding on the issue of finality, so that the Court of Appeals would have a fully developed record on that issue. In this case the Court of Appeals expressly declined to follow the procedure suggested by *Gosa* (550 F.2d 1106, 1110, n. 5). By refusing to follow that pro-

cedure, the Court of Appeals in this case not only unfairly deprived the parties of the opportunity to offer evidence on the finality issue, it also deprived itself of the benefit of having that issue fully developed through the adversary process and of having the initial factual determination made by the District Court.

If orders determining that actions cannot proceed as class actions are to be appealable as "final decisions" under 28 U.S.C. §1291, then in all cases the parties should be given an opportunity after such an order to discover and to offer evidence on the question of whether or not that order is indeed final. By failing to require such a hearing in this case, the Court of Appeals erred. Therefore, even if this Court does not reject the death knell doctrine, it should reverse the decision of the Court of Appeals in this case.

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the defendant's position that the information requested by the plaintiffs was not a list of the class members who were entitled to receive notice. The defendant remained willing to produce the information, but it did not agree that notice to the initial registered owners constituted notice to the class.

This point is made abundantly clear in the memorandum filed by the defendant Punta Gorda Isles, Inc. in opposition to the Plaintiffs' Second Request for Production of Documents; the following statement appears on page 6 of that memorandum:

> "In the event that . . . the plaintiff wishes to have the names and addresses of the initial registered holders, rather than having only the names and addresses of the brokers, *Punta Gorda is certainly willing to request the transfer agents to prepare lists of the initial registered holders and to furnish such lists to the plaintiffs* if the plaintiffs pay the expense of compiling such lists. The plaintiff obviously needs a list of the brokers who were the first record holders . . . in determining the purchasers at the offering, and *the defendant has never objected to furnishing names of such brokers or first registered holders to the plaintiff* at the plaintiffs' expense. What the defendant has objected to is (1) furnishing a list of registered holders *after* the first registered holders, and (2) the giving of the notice only to the first registered holders rather than to the members of the class and (3) giving the notice to persons who are not members of the class and (4) bearing the expense in connection with the plaintiffs' notice." (Emphasis added).

In short, the defendant Punta Gorda never refused to furnish the information requested by the plaintiff, and Judge Stephenson's statement to the contrary is erroneous. The defendant did no more than to advise the plaintiffs that they were seeking the wrong information.

Another fact was known to the District Court but apparently overlooked by the Court of Appeals. After receiving the letter dated April 21, 1976, the plaintiffs were totally inactive for another three months. The plaintiffs' request for production of documents was not filed until July 20, 1976. And even then the plaintiffs failed to address the problem of identifying the "street name" holders. In the context of a case already marred by long delays this additional three months delay by itself would support the district court's decision to decertify.

[4] There can also be a question whether another class member will assert the claims of the class where, as occurred in this case, the requisite class has been found but the named plaintiffs are held not to be adequate class representatives. *See Hooley v. Red Carpet Corp. of America*, 549 F.2d 643 (9th Cir. 1977).

B. The Court of Appeals did not consider all factors relevant to finality.

In this case the Court of Appeals considered only the size of the claim of the named plaintiffs, their financial resources and the probable cost and complexity of the lawsuit. (550 F. 2d 1106, 1109). The approach of the Court of Appeals is overly simplified, perhaps simplistic. A realistic analysis of whether or not a class action decision is final as a practical matter involves many more facts.

The "death knell" doctrine requires the Court of Appeals to predict whether the plaintiff will continue the litigation if the district court's order on the class action issues is not reversed; finality is measured by the predicted effect of the order on the plaintiff's volition.[4] In deciding whether a particular determination of the class action issues adverse to the plaintiff is a "final decision," the appellate courts have focused primarily on a single factor: the amount of the plaintiff's claim. Compare *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971) with *Milberg v. Western Pacific Railroad Co.*, also 443 F.2d 1301 (2d Cir. 1971). But in many cases this factor has only marginal relevance; in reality the two critical issues are:

1. Is the plaintiff's counsel willing to continue to prosecute the case after an adverse decision on the class action issue by the district court?

2. Is there a source of financing for the costs and expenses of continued litigation after such a decision?

If these two questions can be answered in the affirmative, the district court's decision cannot be regarded as the "death knell" of the action, and an appeal should not be permitted under 28 U.S.C. §1291.

In most cases, the willingness of plaintiff's counsel to continue after an adverse ruling on the class action issues will be determined by four factors:

1. The estimate by plaintiff's counsel of the probability of success on the merits; and

2. The estimate by plaintiff's counsel of the probability of successfully appealing the class action decision if the plaintiff succeeds on the merits; *see United Airlines, Inc. v. McDonald*, — U.S. —, 53 L. Ed. 2d 423, 431 at n. 14 (1977); and

3. The size of the fee anticipated by plaintiff's counsel if he is ultimately successful both on the merits and on the class action issues; and

4. The estimate by plaintiff's counsel of what additional work he would have to do to try the merits of the individual plaintiff's claim and then to appeal the class action decision.

If the plaintiff's counsel believes that there is a significant probability of success on the merits, and if he also believes there is a significant probability of successfully appealing the adverse class action decision if he does succeed on the merits, then it is highly probable that he will continue the litigation after an

adverse decision on the class action issues—even if the size of the named plaintiff's claim is minimal.[5]

The possibility of an adverse decision on the class action issues by the district court has to be considered by the plaintiff's counsel right from the beginning. In a real sense, then, an interlocutory order by the district court adverse to the plaintiffs on the class action issues does no more than increase the anxiety level of plaintiff's counsel. If he believes that he can convince the Court of Appeals to reverse that decision on appeal, he will continue to prosecute the action—whether that appeal occurs immediately and before the decision of the district court on the merits, or whether he is forced to wait until after a decision on the merits to appeal the class action decision.

Another factor relevant to a decision on finality is the availability of a source of financing for the costs and expenses of the

---

[5] Consider, for example, a hypothetical plaintiff's counsel who undertakes representation of a class where he feels the matter at the outset is worth pursuing based on his evaluation of a potential recovery on the merits that would result in a $600,000 fee. If at the beginning he feels there is a 90% chance of success on the class action issue, he would discount the value of the potential recovery and fee by 10%, but would still pursue the matter in anticipation of a fee "valued" at $540,000.

Suppose that thereafter the district court makes a determination that the action should not proceed as a class action, and that the plaintiff's counsel believes the decision by the district court is erroneous. If an immediate appeal of the class action decision is not available, the plaintiff's counsel must then estimate the probability of success on a later appeal on the class action issue. If he estimates the probability of success on that appeal as 50%, then the adverse ruling on the class action question by the district court reduces the value of his expectation from $540,000 to $300,000 (.50 x $600,000). The question of "finality" then becomes: Will plaintiff's counsel continue to prosecute the action on the basis of an expectation having a present value of $300,000? In making this decision the plaintiff's counsel must consider how much trial preparation and discovery he has already accomplished, and he must estimate the additional work required to try the merits of the plaintiff's claim and to appeal the class action decision. It is this additional effort that he must weigh against his reduced expectation in deciding whether or not to continue.

litigation (other than counsel fees). At the commencement of a proposed class action, there are at least three potential sources of financing:

(a) the named plaintiff;

(b) plaintiff's counsel; and

(c) unnamed members of the proposed class.

A realistic assessment of the finality of a decision by the district court adverse to the plaintiff on the class action issues must examine its impact on these sources of financing.

In the accepted model of a lawsuit, the plaintiff agrees to be responsible for the payment of the costs and expenses of prosecuting his claim. While it may be permissible for counsel to advance or guarantee the payment of such costs and expenses, the client should remain "ultimately liable." *See ABA Code of Professional Responsibility*, E-C 5-8, DR-5-103(B). When the named plaintiff in a proposed class action agrees to be "ultimately liable" for the costs and expenses of prosecution he knows that the obligation he assumes is contingent and not absolute. He will not have to pay if:

(A) (1) he ultimately prevails on the merits; and

(2) he ultimately prevails on the class action issues; and

(3) the court orders that he be reimbursed for his costs and expenses from the amounts recovered for the class;

or (B) (1) his counsel advances the costs and expenses; and

(2) for one reason or another, his counsel does not enforce the plaintiff's responsibility to reimburse him for those amounts.

What is the effect of an adverse class action decision by a district court on a plaintiff who has accepted such an contingent

obligation? The decision does not preclude the possibility of the named plaintiff ultimately prevailing on both the class action issues and on the merits. He can proceed to try his individual claim on the merits and then appeal the class action decision. *United Airlines, Inc. v. McDonald*, — U.S. —, 53 L.Ed. 2d 423, 431 at n. 14 (1977). If he is successful on the merits and on the appeal of the class action decision, in the end he will not have to pay the costs and expenses of litigation. In this sense, then, an adverse decision by the trial court on the class action issues does no more than increase the probability that the named plaintiff may ultimately have to pay the costs and expenses of litigation. That possibility existed prior to a decision on the class action issues by the district court, and the possibility of escaping that payment continues to exist even after an adverse decision on the class action issues by the district court.

The size of the named plaintiff's claim becomes relevant only when it exceeds by an appreciable amount the anticipated costs and expenses of the litigation. In such cases the risk-reward analysis of the individual plaintiff might induce him to continue to prosecute his claim in the hope of recovering on his individual claim more than the costs and expenses of prosecution. However, in those cases in which the amount of the plaintiff's individual claim is less than the anticipated costs and expenses of prosecution, the size of the claim of the plaintiff is irrelevant to the probability of continued prosecution after a district court decision on the class action issues adverse to the plaintiff.

Moreover, if the costs and expenses are being advanced by the plaintiff's counsel, and if the plaintiff expects that his counsel will not try to collect those costs and expenses from him, then the plaintiff will continue to prosecute as long as his counsel is willing to finance the litigation. In such cases the size of the plaintiff's individual claim is irrelevant.

The process by which plaintiff's counsel decides whether or not to continue to advance the costs and expenses of a proposed class action after an adverse decision on the class action issues by the district court is similar to the process by which he decides whether or not to continue the prosecution of the action. This process was described above; on the decision to advance the costs and expenses the size of the claim of the individual named plaintiff is no more relevant than it was on the decision of counsel to continue to prosecute.

The third potential source of financing for a class action is other members of the proposed class. It may well be that in many proposed class actions it is not feasible or realistic to expect financial assistance from unnamed members of the class. In this case, however, as more fully developed above,[6] the record clearly indicates that such assistance was available.

In summary, the finality of a class action decision adverse to the plaintiff depends on (i) whether plaintiff's counsel is willing to continue to prosecute after the decision, and (ii) whether a source of financing is available for the costs and expenses. The resolution of the first of these issues depends primarily on subjective estimates made by plaintiff's counsel concerning the size of his anticipated fee and the probability of success; it is not dependent upon the size of the claim of the individual plaintiff. The resolution of the second issue may also be independent of the size of the plaintiff's claim; if the costs and expenses are being advanced by the plaintiff's counsel (who usually stands to gain substantially more than the individual plaintiff), his decision as to whether to put more money into the case will be based on essentially the same considerations as his decision on whether to put more time into the case. Consequently, a decision on finality cannot be based on the size of the plaintiff's claim or other facts that concern only the individual plaintiff. Any realistic analysis of finality must focus

[6] See note 2, *supra*.

on the plaintiff's counsel as well as on the plaintiff. *Hackett v. General Host Corp.*, 455 F.2d 618 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972).

In this case the Court of Appeals erred in not considering any factors except the size of the plaintiffs' claim, their financial resources, and the probable cost and complexity of the lawsuit. By so limiting its inquiry into finality it overlooked those factors that in fact determine finality. Consequently, even if the Court does not reject the death knell doctrine, it should reverse the decision of the Court of Appeals in this case.

II

The Court Should Reject the Death Knell Doctrine and Hold That the Court of Appeals Erred in Determining That the Order of the District Court Was a "Final Decision".

The Courts of Appeals in two circuits have expressly refused to adopt the death knell doctrine. *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 (7th Cir. 1973); *Anschul v. Sitmar Cruises, Inc.*, 544 F. 2d 1364 (7th Cir.), cert. denied, 429 U.S. 907 (1976); *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972); *Katz v. Carte Blanche Corp.*, 496 F. 2d 747 (3d Cir. *en banc*), cert. denied, 419 U.S. 885 (1974). In these circuits an order of a district court that an action cannot proceed as a class action can be appealed (like any other interlocutory order) only when the conditions of 28 U.S.C. § 1292(b) are met. This rule is sound, and this Court should reject the death knell doctrine for each of the reasons set forth in the brief of the other petitioner, Coopers & Lybrand. There is yet another compelling reason for rejection of the doctrine: the proper application of the doctrine would create a totally unwarranted tangle of procedural complexities.

It is patently not acceptable for a Court of Appeals to be the initial finder of fact on such a fundamental issue as finality, particularly if the court does not have a record directed toward such issue. Therefore, if death knell is to be accepted, there should be a procedure whereby the trial court can make the initial decision on finality upon a hearing and after an opportunity for discovery of evidence. But to create a procedure in the trial court for determination of the issue of finality would add yet another layer of procedural complexities to the already cumbersome class action device.

There is today in most class action cases a separate hearing on the class action issues, complete with extensive discovery, briefs, evidence, and opinions; it is frequently as complex and as time-consuming as a trial on the merits. To add a comparable hearing on the issue of finality would further increase the procedural involution of the class action. But not to have a hearing on finality would leave that issue to the intuition of the appellate courts, who would be guided only by a record developed on other issues. Moreover, many of the factors relevant to a realistic decision on finality are not easily proven or disproven by conventional evidence. If, as was suggested above, a relevant factor is the estimate of probability of success on the merits made by the plaintiff's counsel, what evidence could be offered concerning that factor? If the plaintiff's counsel testifies, what is the proper scope of cross-examination? Is the expectation of the plaintiff concerning the payment of the costs and expenses a proper subject for discovery? A hearing on the question of finality is a procedural thicket that should be avoided if at all possible.

It is not necessary to venture into that thicket. An appeal pursuant to 28 U.S.C. § 1292(b) is not dependent upon a finding of finality, and the availability of that statutory procedure for appellate review of at least some class action determinations has been widely recognized; *see, e.g., Katz v. Carte Blanche*

Corp., 496 F. 2d 747 (3d Cir., *en banc*), cert. denied, 419 U.S. 885 (1974); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F. 2d 594 (4th Cir. 1976); *Eastland v. Tennessee Valley Authority*, 553 F. 2d 364 (5th Cir. 1977), cert. pending; *Anschul v. Sitmar Cruises, Inc.*, 544 F. 2d 1364, 1368-1369 (7th Cir., cert. denied), 429 U.S. 907 (1976); *Sperry Rand Corp. v. Larson*, 544 F. 2d 868, 871 n.3 (8th Cir. 1977); *Blackie v. Barrack*, 524 F. 2d 891, 900 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); *Bowe v. First of Denver Mortgage Investors*, 562 F. 2d 640, 644 (10th Cir. 1977). Certainly there is nothing in the record in this case to indicate that the procedure provided by 28 U.S.C. § 1292(b) is inadequate.

The solution to the procedural problems created by the death knell doctrine is straight-forward: The doctrine should be rejected. Decisions on class action issues are not "final decisions" within the meaning of 28 U.S.C. § 1291, and they should be appealable only to the extent and by the method set out in 28 U.S.C. § 1292(b).

CONCLUSION

The Court should reject the death knell doctrine and hold that an order determining that an action cannot proceed as a class action is not a "final decision" within the meaning of 28 U.S.C. § 1291. The judgment of the Court of Appeals should be reversed.

If this Court does not reject the "death knell" doctrine, the judgment of the Court of Appeals nevertheless cannot stand. This Court should vacate the judgment of the Court of Appeals and remand the case to the District Court for a hearing and an initial decision on the issue of finality.

Respectfully submitted,

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ADDENDUM

ADDENDUM

28 U.S.C. § 1291.—Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292.—Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in mhich appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rule 23, F.R.Civ.P.—Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an actior. maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims

or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1836

COOPERS & LYBRAND,

Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,

Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,

v.

Petitioners,

CECIL LIVESAY and DOROTHY LIVESAY,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

(a) With Respect to All Petitioners

Does an immediate appeal lie from an order decertifying a class for alleged failure to prosecute where the Court of Appeals concluded that it would not be economically feasible for respondents to proceed on their individual claims, and where important rights of respondents and other class members would be irreparably lost absent an immediate appeal?

(b) With Respect to Petitioner Coopers & Lybrand

Did the Court of Appeals act within its authority in (a) ruling that the District Court had abused its discretion in decertifying the class for an alleged failure to prosecute when the delays in the litigation were actually caused by petitioners and by the District Court, and (b) remanding the case to the District Court for further proceedings consistent with the Circuit Court opinion?

Statement of the Case

(a) Proceedings to and Including Class Certification

In May 1972, petitioner Punta Gorda Isles, Inc. ("Punta Gorda") sold to the public approximately $18,088,000 worth of common stock and debentures pursuant to a Registration Statement and Prospectus ("the Prospectus"). Respondents Cecil Livesay (the Police Chief of Glendale, Missouri) and his wife, Dorothy Livesay, purchased securities at the offering in reliance upon the Prospectus, and even-

tually sustained a $2,650.00 loss on their investment.* (A 116-17) In July 1973, respondents—then represented by predecessor counsel—commenced this class action for damages resulting from purchases of such securities. The action was brought solely on behalf of persons who purchased on the offering itself, and the class was therefore limited to persons who purchased on May 2 and 3, 1972. (A 197)

The first amended complaint alleges that defendants violated various sections of the federal securities laws including Sections 11, 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. §§77k, 771(2), and 77q(a) and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b). (A 23)** Defendants include Punta Gorda (a Florida land development company), various individuals who were officers and directors of Punta Gorda, and Coopers & Lybrand ("Coopers"), the accounting firm which certified the financial statements in the Prospectus. (A 24-26)

Shortly after commencement of the action, respondents filed an amended complaint, interrogatories, and document production requests, and certain defendants served interrogatories on respondents. Answers, objections and re-

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* In its next Annual Report to Shareholders after the offering, Punta Gorda restated earnings reported in the Prospectus, writing down its 1970 net income by $1,039,700 (approximately two-thirds of 1970 net income), and writing down its 1971 income by $1,392,159 (approximately 40% of 1971 net income). (A 30)

** The first amended complaint alleges that the Prospectus was materially misleading, *inter alia*, in (a) failing to report results of operations and financial condition fairly and in accordance with generally accepted accounting principles and generally accepted auditing standards; and (b) failing to reveal the extent to which Punta Gorda's profitability had been and would be adversely affected by ecological regulation which impaired Punta Gorda's ability to develop canal front homesites. (A 28-35)

sponses were filed by all parties by mid-February 1974 and respondents noticed a deposition in March 1974. (A 1-5)

On April 11, 1974, respondents moved for an order determining that the action proceed as a class action. (A 85) Shortly thereafter, petitioners took respondents' depositions on all issues relating to class certification and to respondents' contentions on the merits. Extensive inquiry was made into the amount of respondents' loss, financial resources, anticipated expenses of the litigation, and intention to continue the litigation if class certification was denied. (*E.g.*, A 57-58, 60, 62-70, 72-75, 78-81)* Immediately upon conclusion of such depositions, Coopers moved to stay all discovery other than discovery relating to the class action determination. District Judge Wangelin granted Coopers' motion on May 14, 1974. (A 6, 86)

On May 20, 1974 Coopers moved to dismiss the class action allegations in the amended complaint (A 7), and the class motion was argued to the District Court on June 24, 1974. (A 87) Petitioners maintained that an evidentiary hearing should be held on the class issue but the District Court did not make such ruling.** Although on July 16, 1974, the District Court denied Coopers' motion to dismiss the class action allegations, respondents' application for class determination remained *sub judice.* (A 91-93) Faced with delay in the decision on the class motion, respondents filed a motion for dissolution of the stay on discovery on

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* See detailed discussion below, pp. 35-36.

** Judge Wangelin made no direction concerning an evidentiary hearing at the oral argument but indicated that he might provide a future direction in this regard, stating "my present thinking about the matter at this point" was that, "if I decide . . . [the question whether reliance is an individual issue affecting manageability] for you [*i.e.*, in favor of respondents] then I think we'll have a hearing." See Transcript, June 24, 1974, p. 37. However, Judge Wangelin did not order a hearing in his subsequent decision which rejected petitioners' arguments concerning reliance. (A 91-93)

September 4, 1974 which was denied on September 23, 1974. (A 96, 100)

Petitioners continued to seek an evidentiary hearing, and on September 26, 1974, respondents' counsel requested a conference with Judge Wangelin to discuss the need for such a hearing. (A 101) This request was respondents' second attempt to obtain direction from the District Court concerning the need for such a hearing. (See A 99)

A week later, Coopers moved for reconsideration of the District Court's July 16, 1974 order which had refused to dismiss the class action allegations. (A 94) Such motion was filed even though the class motion had been argued and continued *sub judice*, and despite the lack of any new developments in the case.

Thus, by early November 1974, the lawsuit was for all practical purposes stayed in its entirety without resolution of the class motion which had been argued five months earlier and without resolution of the evidentiary hearing question. Consequently, respondents filed a petition for a writ of mandamus on November 1, 1974 requesting the Eighth Circuit Court of Appeals to order Judge Wangelin to lift the stay on discovery. (A 103) On November 15, 1974, the Eighth Circuit denied the petition for a writ of mandamus, but directed that:

> ". . . petitioner [*i.e.*, respondents herein] should request a prompt ruling on its motion of April 9, 1974, for an order determining that a class action existed. If an evidentiary hearing is desired, that can likewise be requested. *The trial court should then promptly rule on petitioner's motion and remove its stay order and thereafter permit discovery to proceed on the merits,* postponing the actual trial date in order to permit necessary discovery.

"We are satisfied that the trial court will act in compliance with the views of this Court, and, therefore, we now deny the petition for writ of mandamus." (emphasis added). (A 107-08)

As a result of the Eighth Circuit's Order, an evidentiary hearing on the class motion was held on December 30, 1974. At that hearing testimony was presented concerning the extent of respondents' loss, financial position, anticipated litigation expenses, and their intention to pursue the litigation if class status was denied. (*E.g.*, A 117, 119-21, 125-26, 128-145)* At the conclusion of the evidentiary hearing, District Judge Wangelin stated that an immediate appeal would be appropriate if he refused to certify the class:

"I'm sure you've all heard of the quote Death Knell Doctrine, and assuming, without deciding, that I rule against a class action, I think the record should be in such shape that plaintiffs could 1291 it, and go up to the Eighth Circuit and get an opinion. . . ." (A 166)

Notwithstanding the Eighth Circuit's instruction that the class motion be decided promptly, the District Court did not decide the class motion until June 19, 1975 (A 168-172) —approximately one year after it was argued and seven months after the Eighth Circuit urged a prompt decision. Judge Wangelin's opinion certifying the class expressly found that plaintiffs were adequate representatives of the class, that "common questions clearly predominate in this lawsuit", and that "this action may be maintained as a class [sic] pursuant to Rule 23. . . ." (A 169-70). Judge Wangelin also held, however, that new counsel was required for the class representatives because their existing counsel had a

* See detailed discussion below, pp. 35-36.

possible conflict of interest in his continuing relationship with one of Punta Gorda's underwriters.* (A 170-72).

(b) Proceedings Subsequent to Class Certification

Respondents' original counsel voluntarily withdrew from the action, and their present counsel appeared on June 30, 1975. (A 12) In subsequent proceedings there developed a pattern of District Court acquiescence in repeated requests by petitioners for reconsideration of prior decisions and for delay in implementing the Eighth Circuit's mandate to lift the stay on discovery. In addition, the District Court improperly directed respondents to name additional defendants and rendered further decisions which had as a practical effect the failure of this action to move beyond questions of class certification and into discovery on the merits.

Consistent with the prior direction of the Eighth Circuit, respondents again moved to dissolve the stay on discovery on July 25, 1975. (A 175) Coopers opposed such motion and

* The Prospectus listed the underwriter involved—I.M. Simon & Co.—as one of the 51 firms in the underwriting syndicate; the seller of $125,000 principal amount of debentures out of a total of $15 million of debentures being offered; and the seller of 1,500 shares of stock out of a total of 171,570 shares being offered. The record indicates that since 1969 respondents' predecessor counsel had performed certain legal services for I.M. Simon & Co. on matters unrelated to this litigation. (A 153-54) The record also indicates that Coopers' counsel, Bryan Cave McPheeters & McRoberts, also represented I.M. Simon & Co. during the same period on various matters. (A 153-54) In addition, Punta Gorda's present counsel, Peper Martin Jensen Maichel and Hetlage, represented the underwriters including I.M. Simon & Co. (not Punta Gorda) in connection with the very offering at issue in this litigation. (See A 182) Despite such special access to information concerning the responsibility of the underwriters, counsel for petitioners failed to assert any third party claims for contribution or indemnification against the underwriters, but instead argued that respondents were inadequate class representatives for failing to sue petitioners' attorneys' own clients.

sought still further reconsideration of class issues, requesting a statement from counsel concerning their intent to join underwriters as additional defendants, and seeking reconsideration of questions already decided concerning the adequacy of respondents as class representatives.* (See A 178-180).

In reply, respondents stated their intention not to name additional defendants. Respondents stressed that the class would not be prejudiced thereby, since the instant defendants had sufficient means to satisfy any judgment obtained against them and were in counsel's opinion those persons and entities primarily liable for the damages sustained by the class. Moreover, the underwriters could be required to provide relevant discovery even if they were not joined as defendants. Respondents also indicated concern that such joinder might not be timely since this action had been pending since 1973. (A 183)

On October 23, 1975, the District Court denied respondents' motion to lift the stay on substantive discovery on the ground that respondents had failed to join the underwriters. The District Court ordered respondents to join such additional parties subject to reconsideration by the

* Coopers sought to reopen the question of the willingness of Chief and Mrs. Livesay to vigorously prosecute the action and to meet their financial responsibilities as class representatives despite Judge Wangelin's express ruling subsequent to an evidentiary hearing and extensive briefing of such issues that respondents would be adequate representatives. Coopers also questioned the background and experience of respondents' new counsel (Milberg & Weiss) despite the fact that the firm had been appointed lead or general counsel in numerous securities class actions (See A 181-82) and that Melvyn I. Weiss, the partner in charge of this litigation, was then scheduled to serve, together with two representatives of Coopers, as a faculty member of a Practicing Law Institute Seminar on "Accountants' Liability: Law and Litigation" to be held in Los Angeles and New York City in October 1975. (See A 182) Raising such issues served no purpose except to delay the litigation.

Court if respondents sought an *in camera* conference. (A 186-190). Judge Wangelin did not in that opinion decertify the action as a class action, but instructed that a form of notice of pendency of class action be prepared which would invite class members to petition for appointment as new class representatives. (A 188) Judge Wangelin also held that he would not decide which issues were suitable for class action treatment until the expiration of the period of time given in the notice for class members to opt out or enter an appearance so as to provide "any class member who may appear an opportunity to be involved in this determination." (A 189)

On November 4, 1975 a conference was held for the purpose of further considering respondents' reasons for not joining the underwirters.* At such conference, respondents reiterated the reasons described above and advised the Court of their opinion that any claims against underwriters had been barred by the statutes of limitations prior to the date upon which present counsel appeared. Despite such representations, Judge Wangelin persisted in his decision to distribute the form of class notice outlined in his October 23, 1975 decision. (A 194-199).

In such decision, Judge Wangelin had directed that proposed forms of notice of pendency be submitted to him within thirty days. (A 190) In an effort to expedite this process, counsel for respondents agreed upon a joint form of notice with counsel for Punta Gorda.** Proposed notices of pendency were submitted to Judge Wangelin in November 1975 (A 14). Judge Wangelin did not mail his proposed notice of pendency to counsel until March 1, 1976. (A 193) On April 9, 1976, the District Court mailed to all counsel the final form of notice of pendency (A 194-199), which

* No transcript was made of that conference.

** Counsel for Coopers refused to participate in a joint notice and submitted their own proposal.

form contained certain provisions to which respondents had previously objected. (A 212-214) Such provisions included a statement that no particular questions would be certified for class treatment until after the deadline expired for opting out or intervening. (A 197)

On October 23, 1975, when requesting forms of notice of pendency, Judge Wangelin had lifted the stay upon discovery only to permit discovery of class members' names and addresses. (A 189) In accordance with prior practice respondents had planned to notify the class by sending first class mail to persons who were record owners of the relevant securities. Long before the October 23, 1975 order respondents had arranged to obtain such information informally through the cooperation of Punta Gorda's counsel. (See A 176-177) The notification procedure anticipated had been utilized widely in securities class actions, and review of transfer records with the cooperation of defendants had been and remains a standard practice for identifying recipients of the notice. (See discussion below on p. 58, n.**) Indeed on September 7, 1977 Judge Wangelin himself approved precisely such a procedure for identifying and providing notice to the class members.*

On April 20, 1976, promptly after receiving the final form of notice of pendency, respondents asked counsel for Punta Gorda to furnish the names and addresses of the initial registered owners (after the underwriters) of the relevant securities pursuant to respondents' prior understanding that such information would be provided. Punta Gorda replied by letter dated April 21, 1976 (A 215-216) that it could not produce the relevant addresses because such addresses were in the possession of Punta Gorda's transfer agent. Such a reply can only be considered a delaying tactic, since Punta Gorda, as principal, had the authority

* Judge Wangelin's September 7, 1977 Order is set forth as Appendix A hereto.

to direct its transfer agent to produce the requested documents.* Punta Gorda's counsel also indicated an unwillingness to furnish transfer records on the ground that certain record owners might not be beneficial owners or class members (A 215-216), thus ignoring the fact that under *any* notice program review of the transfer records is a necessary and standard practice.

Faced with Punta Gorda's continuing refusal to produce the necessary transfer records, respondents in early July sought a conference with Judge Wangelin to resolve the issue. The conference was held on July 26, 1976. To assure that the record reflected respondents' outstanding discovery requests, respondents served on Punta Gorda their Second Request for Production of Documents, which formally requested the types of documents already requested and refused. (A 200) At the July 26, 1976 conference, Judge Wangelin directed respondents to serve papers in support of such production request** and respondents' memorandum in support of such request was filed on August 8, 1976. (A 15) The propriety of respondents' document production request, respondents' proposed method of notice, and Punta Gorda's objections*** had not yet been decided by Judge Wangelin when on September 1, 1976 he decertified the action as a class action. (A 15-16)

* A representative of the transfer agent for Punta Gorda stock had testified at the evidentiary hearing on the class motion that the transfer agent could only produce such information at the direction of Punta Gorda. (A 112)

** See Transcript of Conference in Chambers, July 26, 1976, pp. 22-24.

*** Punta Gorda's Brief is incorrect in stating that Punta Gorda never objected to producing the transfer records of the initial registered owners but only to producing such records without payment. Punta Gorda Brief, pp. 10-13, n.3, In fact, Punta Gorda filed formal objections to respondents' document production request which expressly refused to provide transfer records on the ground that "such documents are not in defendants' custody" and that respondents should obtain such documents "from the appropriate persons." (A 205-206)

(c) District Court Decertification of This Action as a Class Action

Not until respondents sought Court assistance in compelling production of the relevant transfer records did Coopers serve its motion to decertify the class. (A 201) In accord with past practice by petitioners, Coopers' motion relied heavily on arguments against class status previously raised by petitioners and previously rejected by Judge Wangelin.*

In contrast to the substantial periods of time required for determination of the class motion and form of notice of pendency, Judge Wangelin ruled promptly on Coopers' motion and decertified the class on September 1, 1976. (A 207) In his Memorandum decertifying the class, Judge Wangelin relied solely on alleged undue delay by respondents as a basis for decertification, and characterized the motion as follows:

> "The basis of the various defendants' motion is that the plaintiffs, as class representatives, are failing to prosecute this action, and are therefore denying the defendants a right to a speedy adjudication of the claims against them." (Pet. Cert., p. A-7).**

* Such grounds included an alleged unreasonable delay by respondents' former counsel in filing the class motion and seeking an evidentiary hearing, failure to sue the underwriters, and an alleged lack of manageability of the case as a class action (A 201-204. See A 167; Coopers Suggestions in Support of Defendant's Motions, filed August 20, 1975; Post Hearing Memorandum of Coopers in Opposition to Plaintiffs' Motion for a Determination that this Action may Proceed as a Class Action, filed April 10, 1975). The one new ground raised by Coopers was an alleged unreasonable delay by respondents in seeking to identify the names and addresses of class members. (A 202-203)

** References to "Pet. Cert." are to pages of the Appendix to the Petition for Certiorari of Punta Gorda, et al.

Judge Wangelin further remarked:

> "The defendants are merely seeking, as is their right, to have a speedy adjudication of the claims against them." (Pet. Cert., p. A-8)

Not until Judge Wangelin decertified the class did he lift the stay on substantive discovery. (A 207) Prior to the decertification motion, respondents' present counsel had unsuccessfully attempted to persuade the District Court to lift the stay in applications filed on July 25, 1975 and on November 26, 1975. (A 175, 191-192) Respondents' last attempt to lift the stay was in a cross-motion to Coopers' motion to decertify on August 16, 1976. (A 15)

Subsequent to the Eighth Circuit's reversal of the decertification order, respondents' efforts to move the action forward on the merits have again been blocked by the District Court. On December 7, 1977, the District Court *on its own motion* stayed all further proceedings and motion practice pending determination of the issues before this Court.* Among the motions which will not be decided until such stay is lifted is respondents' motion (served August 9, 1977) to compel production of documents and interrogatory answers from petitioners. Until that motion is decided, Coopers will have successfully avoided producing even one scrap of paper in this litigation despite persistent efforts by respondents to obtain discovery during a period of over four years.

(d) Disposition on Appeal

Respondents sought relief in the Court of Appeals both by appeal (A 208) and by filing a Petition for a Writ of

* Judge Wangelin's December 7, 1977 Order is annexed hereto as Appendix B.

Mandamus. Respondents predicated their right to an immediate appeal on the "death knell" and "collateral order" doctrines and on the interpretation of 28 U.S.C. § 1291 set forth in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54 (1964).

The Eighth Circuit held unanimously that it had jurisdiction to review the decertification decision under 28 U.S.C. §1291 because the decertification sounded the "death knell" of the action; reversed the decertification order as an abuse of discretion; and dismissed the mandamus petition as moot. (Pet. Cert., pp. A-10 through A-21; 550 F.2d at 1106-13) Application of the death knell doctrine was based on the extensive material in the record concerning the size of respondents' loss, respondents' financial condition, and anticipated costs and expenses of the litigation. The Court noted that extensive discovery in Florida would be required and that utilization of expert testimony was indicated. (Pet. Cert., p. A-13 through A-16; 550 F.2d at 1109-10)

On the merits, the Court of Appeals carefully analyzed the three periods of alleged delay upon which the decertification order was based, and unanimously concluded that Judge Wangelin's finding of undue delay by respondents was "wholly unsupported by the record." (Pet. Cert., p. A-16 through A-20; 550 F.2d at 1110-1112) To the contrary, the Eighth Circuit concluded that the undue delay in the case was in large part caused by defendants and was also attributable to the District Court. (Pet. Cert., p. A-19 to A-20; 550 F.2d at 1112)

In consequence, the Court of Appeals reversed the order decertifying the class, and remanded the case "for further proceedings consistent herewith". (Pet. Cert., p. A-21; 550 F.2d at 1113)

Summary of Argument

The death knell doctrine is fully consistent with this Court's "intensely practical" interpretation of the final decision rule—an approach designed to assure that technical notions of finality do not effectively deprive litigants of their right to appeal important issues. Respondents cannot proceed absent an immediate appeal because an action based on their individual claim would be economically impracticable. Lack of economic viability is a proper reason for treating denial of class status as a final decision, since the drafters of Rule 23(b)(3) of the Federal Rules of Civil Procedure recognized that economic realities would prevent small claim-holders from bringing suit on their individual claims unless the suit could be brought as a class action. Absent the right of immediate appeal, respondents would be required to proceed regardless of the economic viability of their individual claim. If Respondents do not proceed, they would be subject to dismissal for lack of prosecution and would apparently be precluded from raising the class issue on an appeal from such a dismissal.

The record in the District Court strongly supports the Eighth Circuit's finding that respondents could not proceed on their individual claim, and that no other class members have appeared for the purpose of continuing the litigation.

Rejection of the death knell doctrine would conflict with the purposes of the final decision rule and Rule 23 by fostering multiplicity of litigation and piecemeal appeals. Such evils would result from encouraging intervention by absent class members (who may after intervening settle their individual claims and not seek class relief, thereby creating a need for new intervenors to protect the class) or from commencement of new actions in other jurisdictions.

Rejecting the death knell doctrine would also have the undersirable effect of facilitating "one way intervention."

The version of the death knell doctrine enunciated in *Hooley* v. *Red Carpet Corp.*, 549 F.2d 643 (9th Cir. 1977) would also produce multiplicity of litigation, since it entails efforts to encourage intervention. The *Hooley* approach also suffers from the difficulty of identifying claims which are large enough to be viable in light of the enormous expenses required to litigate a substantial claim under the federal securities laws against large and well financed entities. Such approach would greatly complicate the litigation by requiring extensive discovery and, perhaps, dissemination of special notices to absent class members.

The death knell doctrine does not discriminate against class action defendants. Whereas respondents will have no opportunity to appeal at a later date because they cannot proceed on their individual claim, petitioners can appeal from a grant of class status after a final judgment on the merits. Petitioners' argument in this regard is really a part of their argument that class actions are unfair to defendants because of an alleged *in terrorem* effect. Such argument is unsupported by the actual experience with class actions and by the record herein. It also ignores the significant *in terrorem* effect exerted on small claim-holders by the ability of large defendants in class actions to devote extensive resources to the defense of claims brought against them.

Respondents' right to an immediate appeal is supported by the collateral order doctrine, since the order below was a final determination of respondents' right to serve as class representatives, review of the merits was unnecessary on appeal, and class members will be denied important rights irretrievably absent an immediate appeal. Lack of an immediate appeal would force class members

who would prefer to exercise their right under Rule 23 to remain passive, to intervene after decertification to protect their individual claims against the running of the statute of limitations. Furthermore, absent class members may have no standing to raise the class issue on a later appeal if respondents were to settle their individual claim prior to any determination of the merits while the action was decertified.

In light of the fundamental importance of the class issue in this litigation and the District Court's statement that an immediate appeal would be appropriate if it denied class certification, the Eighth Circuit also had jurisdiction to hear the appeal under *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964).

Limiting the opportunity for an immediate appeal to the procedure set forth in 28 U.S.C. §1292(b) would be inappropriate. Such a rule would subject respondents' appeal to a double layer of judicial discretion when the appeal should be as of right.

If the Court should rule that the Eighth Circuit had no jurisdiction to hear the appeal, respondents request that the Court remand the case to the Eighth Circuit for consideration of respondents' mandamus petition which the Eighth Circuit dismissed as moot on granting appellate relief.

The Eighth Circuit correctly held that decertification for failure to prosecute was "wholly unsupported by the record." The District Court based its order on plainly erroneous findings of fact concerning respondents' activities while totally ignoring petitioners' persistent efforts to delay, the District Court's own acquiescence in such efforts, and the District Court's own delays in resolving important issues.

The Eighth Circuit did not interfere with District Court discretion by reversing the order below and remanding for further proceedings consistent with its opinion. Since the District Court had previously certified the class, the effect of the Eighth Circuit's decision was not to certify a class in the first instance or to interfere with District Court discretion, but only to reestablish the class which had been earlier certified by the District Court.

Finally, Coopers' argument that the class should be decertified for reasons other than those cited by Judge Wangelin is ill founded. The contention that the class was injured by respondents' failure to sue underwriters has no support in the record and is inconsistent with petitioners' own failure to implead the underwriters. The argument that common issues do not predominate and that the case is unmanageable as a class action is untenable in light of the numerous cases certified as class actions where the class period was far longer in duration than the two day class period involved here and where many more misleading documents were involved than the one Prospectus involved in this action.

ARGUMENT

I

The Court of Appeals Had Jurisdiction to Consider Respondents' Appeal From the Order Decertifying the Class.

1. This Court Has Stressed a Practical Interpretation of 28 U.S.C. §1291 Aimed at Avoiding Piecemeal Appeals, Achieving Economy of Litigation, and Protecting Substantial Rights of Litigants

28 U.S.C. §1291 provides in relevant part as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ..."

This Court has repeatedly recognized and implemented Justice Jackson's statement that:

> "it is a final *decision* that Congress has made reviewable. 28 U.S.C. §1291. 28 U.S.C.A. §1291. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Stack* v. *Boyle,* 342 U.S. 1, 12 (1951) (separate opinion) (emphasis in original), cited in *Abney* v. *United States,* 431 U.S. 651, 658 (1977).

While the "final decision" rule is aimed at achieving economy of litigation and avoidance of piecemeal appeals,* this Court has often emphasized that the finality requirement must be given a practical rather than a technical construction. *E.g., Abney* v. *United States, supra,* 431 U.S. at 658; *Eisen* v. *Carlisle & Jacquelin* (*"Eisen IV"*), 417 U.S. 156, 170-71 (1974); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949).

Justice Frankfurter has stressed that the final decision rule "is not a technical concept of temporal or physical termination," but is "the means for achieving a healthy legal system" by preventing appeals which cause courts "'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation. . . .'" *Cobbledick* v. *United States, supra,* 309 U.S. at 326, citing *Segurola* v. *United States,* 275 U.S. 106, 112 (1927). In the same opinion, Justice Frankfurter also emphasized the importance of not making the doctrine of finality a means of denying any appellate re-

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* *E.g., Catlin* v. *United States,* 324 U.S. 229, 233-34 (1945); *Cobbledick* v. *United States,* 309 U.S. 323, 324-26 (1940); 9 Moore, *Federal Practice* ¶110.07, pp. 107-09 (2d ed. 1975). See Crick, *The Final Judgment as a Basis for Appeal,* 41 Yale L.J. 539, 540, 550-51 (1932).

view on an issue of critical importance to the litigation. 309 U.S. at 328-29.

This Court's "intensely 'practical' "* approach to finality is reflected in various categories of cases where appeals are allowed despite the lack of a final judgment terminating the entire litigation. Thus, a decision may be final when it effectively denies a litigant his day in Court by making further litigation economically impracticable. *Roberts* v. *United States District Court,* 339 U.S. 844 (1950) (denial of application to proceed *in forma pauperis*) (see discussion below, p. 24). The "collateral order doctrine" is applied to prevent effective loss of the right to appeal from important decisions which do not terminate the entire litigation and which do not involve consideration of the merits. *E.g., Swift & Company Packers* v. *Compania Colombiana del Caribe,* 339 U.S. 684 (1950); *Cohen* v. *Beneficial Industrial Loan Corp., supra.*

The Court has also recognized that the goal of economy of litigation may *require* in certain situations an immediate appeal from a decision which neither terminates the litigation nor is totally unsusceptible to review at a later time. *E.g., United States* v. *Nixon,* 418 U.S. 683, 692 (1974) (protracted litigation avoided by not requiring citation for contempt as basis for appeal); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306-308 (1962) (issues still to be litigated sufficiently independent of the critical issues already resolved to make immediate review appropriate).**

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* *Mathews* v. *Eldridge,* 424 U.S. 319, 331 n.11 (1976).

** This Court has also applied such considerations in taking jurisdiction of appeals from state court litigation under 28 U.S.C. §1257 at a time when substantial additional proceedings are pending in the state courts and the federal issue could in fact be appealed at a later date. See discussion in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477-81 (1975); *Mills* v. *Alabama,* 384 U.S. 214, 217-18 (1966).

The above-cited interpretations of the final decision rule strongly support the conclusion that an immediate appeal from an order denying class status is proper if the plaintiff is a small claim-holder who for economic reasons cannot proceed on his individual claim unless the case is a class action. As shown below, denial of a right to appeal herein would conflict with the purposes of the final decision rule by denying litigants like respondents any meaningful appellate review of their right to prosecute their individual claims and by increasing rather than decreasing the likelihood of multiplicity of litigation and piecemeal appeals.

2. The Death Knell Doctrine Was a Proper Basis For Appellate Jurisdiction Under 28 U.S.C. §1291

(a) *The Death Knell Doctrine Is Fully Consistent With the Purposes of the Final Decision Rule*

The Eighth Circuit based its jurisdiction on the death knell doctrine (Pet. Cert., pp. A-13 through A-16; 550 F.2d at 1109-10), under which doctrine various courts of appeals have recognized the right to an immediate appeal from a denial of class status when the named plaintiff's claim is so small as to render continued prosecution of the claim impracticable. *E.g., Ott* v. *Speedwriting Publishing Co.,* 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams* v. *Mumford,* 511 F.2d 363, 366-67 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975); *Graci* v. *United States,* 472 F.2d 124, 126 (5th Cir.), *cert. denied,* 412 U.S. 928 (1973); *Eisen* v. *Carlisle & Jacquelin ("Eisen I"),* 370 F.2d 119, 120-21 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967).*

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* The Seventh and Third Circuits have rejected the death knell doctrine and limited the possibility of an immediate appeal from denial of class status where no injunction is sought to situations where the plaintiff obtains a District Court certification of an appeal under 28 U.S.C. §1292(b). *E.g. Anschul* v. *Sitmar Cruises, Inc.,* 544 F.2d 1364, 1366-69 (7th Cir.) *cert. denied,* 429 U.S. 907 (1976); *Katz* v. *Carte Blanche Corp.,* 496 F.2d 747, 752-56 (3rd

The death knell doctrine is not an exception to the final decision rule. It is rather a proper and necessary application of that rule in a situation where court proceedings are in fact at an end absent an immediate appeal despite the lack of a final judgment. Thus, in the opinion which first formulated the death knell doctrine, the Second Circuit recognized that plaintiff's claims would "never be adjudicated" unless an immediate appeal from denial of class status was allowed. *Eisen I*, 370 F.2d at 120. See also, Note, *Appealability of Class Action Dismissal: The "Death Knell" Doctrine*, 39 U.Chi.L.Rev. 403, 406 (1972).

Petitioners argue that the Third and Seventh Circuit approaches are correct because in their view economic inability to proceed cannot render the decertification a final decision (Coopers' Brief, pp. 21-22). Such an argument ignores the fact that a major purpose of the framers of Rule 23(b)(3) of the Federal Rules of Civil Procedure was to open the courts to small claimants who could not afford to bring suit on an individual basis. *E.g., Eisen* v. *Carlisle & Jacquelin* (*"Eisen II"*), 391 F.2d 555, 560 (2d Cir. 1968); *Advisory Committee's Note to Proposed Rule 23 of Rules of Civil Procedure*, 39 F.R.D. 98, 104 (1966) ("the amounts at stake for individuals may be so small that separate suits would be impracticable"); Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Comm. L. Rev. 497 (1969);* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*,

Cir.) (*en banc*), *cert. denied*, 419 U.S. 885 (1974). The Ninth Circuit has adopted a special version of the death knell doctrine in which the plaintiff must show that "it is highly unlikely that *any* member of the purported class has a claim justifying separate litigation." *Hooley* v. *Red Carpet Corp.*, 549 F.2d 643, 645 (9th Cir. 1977) (emphasis added).

* Justice (then Professor) Kaplan was the Reporter to the Advisory Committee during the 1966 revision of Rule 23.

81 Harv.L.Rev. 356, 397-98 (1967).* Stripping a small claim-holder of the right to bring a class action is thus a final decision on his individual claim since implicit in the enactment of Rule 23(b)(3) is the recognition that, but for the right to proceed in a class action, the small claim-holder cannot proceed at all. As this Court noted in *Eisen IV*, *supra*, 417 U.S. at 161:

> "A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. *Economic reality dictates that petitioner's suit proceed as a class action or not at all.*" (emphasis added)**

The Second Circuit has regarded the death knell doctrine as one specific application of the collateral order doctrine. *E.g., Eisen I*, 370 F.2d 120-21. The death knell doctrine does in fact meet all the requirements of the collateral order doctrine, since the order below finally determines an important claim of right, review of which does not involve the merits of the action, in a context where denial of an

* Earlier expressions of concern over the plight of small claim holders which influenced the development of Rule 23 are set forth in Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 434-5 (1960); and Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U.Chi.L.Rev. 684, 684-86 (1941). Judge Frankel has recognized that the views of the Advisory Committee on Civil Rules with respect to Rule 23 were "strongly influenced" by the above article by Judge Weinstein. Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 A.B.A. Antitrust L.J. 295, 298 (1966).

** This Court affirmed appellate jurisdiction in *Eisen IV* on the ground that an order concerning the allocation of the cost of a class notice came within the collateral order doctrine. In consequence it was unnecessary for this Court to consider whether the death knell doctrine was also a proper basis for appeal. 417 U.S. at 169-72.

immediate appeal is tantamount to denial of any appeal. See *Cohen* v. *Beneficial Industrial Loan Corp., supra.*•

In *Roberts* v. *United States District Court, supra,* this Court applied a similar analysis and cited *Cohen* v. *Beneficial Industrial Loan Corp., supra,* in holding that "the denial by a District Judge of a motion to proceed *in forma pauperis* is an appealable order." 339 U.S. at 845. *Roberts* has generally been interpreted to be based on the litigant's right to appeal from an order which makes it economically impracticable for him to proceed. *E.g., Trustees of Joint Welfare Fund* v. *Nolan,* 549 F.2d 871, 873 (2d Cir. 1977); *Flowers* v. *Turbine Support Division,* 507 F.2d 1242, 1244 (5th Cir. 1975); *Spires* v. *Bottorff,* 317 F.2d 273 (7th Cir. 1963), *cert. denied,* 379 U.S. 938 (1964).••

Coopers also errs in arguing that the decertification order cannot be a final decision because Rule 23(c)(1) provides that "an order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." The decision that respondents were inadequate class representatives because of an alleged failure to prosecute is not conditional, since it is not predicated on facts which can change during the further course of the litigation.

• Respondents submit that the requirements of Section 1291 are met herein without regard to whether the death knell doctrine falls within the collateral order doctrine or is a "distinct but compatible" test for appealability. See discussion in *Share* v. *Air Properties G. Inc.,* 538 F.2d 279, 281 (9th Cir.), *cert. denied,* 429 U. S. 923 (1976).

•• See also discussion by Judge Rosenn, dissenting, in *Hackett* v. *General Host Corp.,* 455 F.2d 618, 627, 630-31 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972). Professor Moore regards the decision in *Roberts* as

> "justifiable quite apart from the *Cohen* rationale. Unlike the order in *Cohen,* such orders effectively end, not simply a collateral claim, but the whole claim or right asserted." 9 Moore, *Federal Practice,* ¶110.10, p. 134 (2d ed. 1975).

Unless respondents are entitled to an immediate appeal from a denial of class status, they would apparently be required to proceed in the District Court on an individual basis regardless of the economic viability of the law suit. If they fail to proceed they risk being dismissed for lack of prosecution and may lose any right to raise the propriety of the denial of class status on appeal from such dismissal. See, *Eisen I, supra,* 370 F.2d at 120.• See also, *Marshall* v. *Sielaff,* 492 F.2d 917, 919 (3d Cir. 1974).••

Furthermore, rejection of the death knell doctrine would enhance rather than reduce the likelihood of piecemeal appeals. If respondents' claims are dismissed for lack of prosecution and some other class member intervenes for the purpose of appealing the class denial, the likelihood is

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• Coopers cites *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958) and *Thomsen* v. *Cayser,* 243 U.S. 66 (1917) incorrectly for "the proposition that the named class representative himself may convert an adverse interlocutory class certification order into an appealable final judgment if he voluntarily dismisses his individual action under Rule 41(a)." Coopers' Brief, p. 30 n.20. In both actions the dismissal of the case was a discretionary act by a District Court which converted an application for a voluntary dismissal into an involuntary one, thereby according the plaintiff an immediate appeal. Dependence upon District Court discretion in this regard is an insufficient substitute for a plaintiff's right to appeal under 28 U.S.C. §1291 if the denial of class certification is in fact a final decision effectively terminating the litigation. The opinions in the two cases cited by Coopers reveal that such dismissals are not appealable if they are regarded as voluntary dismissals under Rule 41(a), but only if the Court of Appeals is willing to regard them as involuntary because of their connection with an adverse result sustained by appellants in the District Court. See 356 U.S. at 680-81; 243 U.S. at 83.

•• In *Marshall* v. *Sielaff, supra,* plaintiff refused to proceed to trial because the Court would not issue a writ of habeas corpus *ad testificandum.* The Third Circuit affirmed the resulting dismissal for failure to prosecute and refused to consider whether the District Court's failure to issue the writ was error. The Third Circuit stressed that considering such issue would allow plaintiff to convert an interlocutory order into a final decision by improperly refusing to prosecute his claim.

that there will be no District Court record of any substance as to the adequacy of the intervenor as a class representative. In consequence, the Court of Appeals may have to remand the case for specific findings on the adequacy of the new class champion,* leaving open the possibility that class status may again be denied and requiring still another appeal for resolution. In addition, other class members may institute law suits in various courts, giving rise to the prospect of numerous appeals in different jurisdictions.

On the other hand, multiple death knell appeals in the same action are not a likely result of adopting the death knell doctrine. Where intervention does not occur, "Experience teaches that it would be a rare case when the specter of multiple appeals in the same case became a reality" (*Anschul* v. *Sitmar Cruises, Inc., supra,* 544 F.2d at 1373 (dissenting opinion of Judges Swygert and Bauer)), and multiple appeals from class denials are especially unlikely in view of the heavy burden an appellant must carry in showing that the District Judge has abused his discretion. The guidance provided by the Court of Appeals when reversing a class denial will also reduce the likelihood of an appeal from any further class denial.

(b) *The Death Knell Doctrine Furthers Important Purposes of Rule 23 of the Federal Rules of Civil Procedure*

Different statutes should be construed if possible to harmonize their purposes.** In consequence, it is significant in construing Section 1291 that the death knell doctrine

* See *Harris* v. *American Investment Co.,* 523 F.2d 220, 228 (8th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976).

** See, *e.g., Morton* v. *Mancari,* 417 U.S. 535, 551 (1974); *Hyrup* v. *Kleppe,* 406 F.Supp. 214, 217 (D.Colo. 1976).

serves important goals of Rule 23. As shown above, the death knell doctrine implements the principle embodied in Rule 23(b)(3) that small claimants often have no realistic access to the courts if they are unable to bring their claims as class actions. The death knell doctrine also avoids encouraging other persons to enter the litigation or commence separate actions at least until the appellate court has determined whether the denial of class status was correct. In consequence, the death knell doctrine assists in preventing the "multiplicity of activity" which this Court has termed "the principle function of a class suit." *American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538, 551 (1974). See also, *United Airlines* v. *McDonald,* —— U.S. ——, 97 S.Ct. 2464, 2470 n.15 (1977).

Encouraging intervention by persons who are concerned to protect their own claims would increase the prospects for complexity and delay, since such persons may settle their cases without appealing the class issue, thus requiring a new intervenor if the class issue is to be resolved.* Moreover, an intervenor might litigate the case on the merits successfully but be unable to serve ultimately as a class representative in a situation where liability was predicated on facts not applicable to the entire class.**

* Respondents submit that their tenacious effort to represent the class despite vigorous opposition over a five year period demonstrates that they are truly concerned to benefit the class. On such a record, the purposes of Rule 23 are better served by allowing respondents to continue their representation of the class than by encouraging intervention by persons who may use the threat of appealing the class issue only as a device to coerce a settlement of their individual claims.

** For example, an intervenor in the present action might have relied in part on oral misrepresentations. Liability to the class predicated on common written misrepresentations might require another intervenor and a new trial.

The "death knell doctrine" further facilitates the purposes of Rule 23 by avoiding the prospect for "one-way intervention." This Court has noted that the 1966 amendments to Rule 23 in part were designed to eliminate situations where class members could wait until a resolution of plaintiffs' claim on the merits before deciding whether to be bound by the results of the action. *American Pipe and Construction Co.* v. *Utah, supra,* 414 U.S. at 547. See also Advisory Committee's Note to Proposed Rule 23 of Rules of Civil Procedure, 39 F.R.D. 98, 105-06 (1966); *Jimenez* v. *Weinberger,* 523 F.2d 689, 698-700 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (19). If respondents cannot proceed on their individual claim and other parties intervene to prosecute claims which are in fact viable on individual bases, leaving the question of class relief to be resolved on an appeal subsequent to a decision on the merits, class members will have been able to avoid making any decision as to whether or not to opt out of the class action prior to a decision on the merits.*

Furthermore, rejection of the "death knell" argument might deprive class members of their right to remain passive prior to the time for filing claims. As this Court stated in *American Pipe and Construction Co.* v. *Utah, supra,* 414 U.S. at 552:

> "During the pendency of the District Court's determination in this regard, . . . potential class members are

* In the event that an intervenor tries his individual claim successfully and obtains reinstatement of the class on appeal, certain class members may wish to take advantage of the intervenor's victory while avoiding reimbursement to the intervenor of the substantial legal fees and costs absorbed in litigating the claim. Assuming the absence of a statute of limitations problem, the class members having large claims might opt out of the class, file suit elsewhere and seek to obtain a recovery from defendants by utilizing the collateral estoppel or precedential effect of the judgment in the original case.

> mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case."

Since *American Pipe and Construction Co.* v. *Utah* holds that statutes of limitations are tolled only until denial of class status, class members must intervene immediately to protect their rights. See discussion below, p. 40. If class status has been rejected improperly, refusal of an immediate appeal effectively denies class members their right to remain passive even without regard to limitations problems, because respondents' inability to proceed except on a class basis would mean that the rights of the other class members will simply not be prosecuted unless they intervene.

(c) *United Airlines, Inc.* v. *McDonald,* —— *U.S.* ——, *97 S.Ct. 2464 (1977) Does Not Render the Death Knell Doctrine Unnecessary*

Coopers errs in arguing that *United Airlines, Inc.* v. *McDonald,* —— U.S. ——, 97 S.Ct. 2464 (1977), renders the death knell doctrine obsolete. In *United Airlines,* the District Court denied class action status for lack of numerosity, and the action proceeded on individual claims. The action was settled after a determination on the merits and plaintiffs did not seek an appeal on the question of class certification. In consequence, respondent in *United Airlines* intervened for the purpose of appealing the District Court's denial of class status. This Court ruled that respondent had filed a timely motion to intervene under Rule 24(b), having filed within the thirty day time period prescribed for appeal.

United Airlines does not support Coopers' argument for a number of reasons. First, respondents' right to litigate their individual claim—which right as a practical matter depends on utilization of Rule 23—is not protected by the right of other persons to intervene. As shown above, if respondents do not proceed and are dismissed with prejudice for lack of prosecution, they would apparently be denied an appeal on the class issue and thus be denied the right to litigate their individual claim. Furthermore, dismissal of respondents' individual claim with prejudice would foreclose them from sharing in any class fund subsequently created by an intervenor.

Second, the *United Airlines* decision was expressly designed to avoid "a rule [which] would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination." 97 S.Ct. at 2470 n.15. Encouraging intervention was deemed undesirable because it would engender the "very 'multiplicity of activity which Rule 23 was designed to avoid.' " *Ibid.* By assuming the need of intervenors to protect the class, petitioners' position encourages multiplicity of litigation and therefore conflicts with the purposes of the *United Airlines* decision.

Third, intervention following final judgment is a possible route to test class denials on appeal only when other class members are aware that a class action has been brought and that class status was denied, and only when intervention occurs within the thirty-day period for appeals. As stated by this Court in *American Pipe and Construction Co.* v. *Utah, supra,* 414 U.S. at 551-52, class members are not presumed to be aware of the existence of the class action until class notices have been distributed. The thirty-day deadline may well slip by before potential intervenors are alerted to the problem.

Petitioners apparently contend that a death knell appeal is rendered unnecessary by *United Airlines* v. *McDonald* because in their view dismissal of the action prior to a determination of the merits could be followed by intervention solely for the purpose of appealing the class issue. Petitioners' argument defeats itself, because such an intervenor would be seeking exactly what respondents now seek—resolution of the class issue prior to determination of the merits. Thus, the result of encouraging intervention in such a situation would be to add a new party and delay the appeal without in any way reducing the prospect for piecemeal appeals. Application of the death knell doctrine will avoid such multiplicity of litigation.

(d) *The Death Knell Doctrine Does Not Discriminate Against Defendants In Class Actions*

The death knell doctrine does not discriminate against defendants, but is simply the result of an evenhanded application of the rule that appeals may only be taken from final decisions. Respondents cannot prosecute the action on their individual claim and therefore will have no opportunity to appeal unless the appeal can be taken at the time class status is denied. On the other hand, petitioners are not deprived of their opportunity to appeal from a grant of class status if they do not have an immediate appeal, because the litigation will continue and petitioners can appeal that determination after a final judgment on the merits.

The law is replete with examples of situations where the party losing a motion is allowed an immediate appeal under the final decision rule while the other party would not have been entitled to an immediate appeal if he had lost the motion. *E.g., Swift & Company Packers* v. *Compania Colombiana del Caribe, supra,* 339 U.S. at 689 (immediate appeal from order vacating attachment proper although no

immediate appeal would have been authorized from order granting attachment); *United Southern Companies, Inc.* v. *Duckworth,* 410 F.2d 377 (5th Cir. 1969) (immediate appeal from denial of summary judgment motion improper); *Compagnie Nationale Air France* v. *Port of New York Authority,* 427 F.2d 951, 954 (2d Cir. 1970) (immediate appeal from grant of new trial improper). See generally, 9 Moore, *Federal Parctice,* ¶110.07, pp. 108-09; ¶110.08[1] (2d ed. 1975).

In light of such precedent, petitioners' argument that the death knell doctrine discriminates against class action defendants should be recognized for what it is: an alternative form of petitioners' argument that class actions have an unfair *in terrorem* effect because of the expense of litigation or the amount of potential damages. The argument is ill founded and is rebutted in detail at pp. 45-54 below. It is appropriate to note, however, that such argument is disingenuous on the record below. Petitioners neither settled this action after class certification nor sought summary judgment or an early trial. Rather, petitioners have in fact raised one class issue after another in this action for almost five years—mostly on repetitious grounds—as a means of preventing a prompt determination of the merits. As the Eighth Circuit noted (Pet. Cert. p. A-20; 550 F.2d at 1112), such activities have greatly increased the expense of this litigation to all parties.

(e) *The Ninth Circuit Version of the Death Knell Doctrine Would Increase the Complexity of the Litigation Without Serving the Purposes of the Final Decision Rule*

The Ninth Circuit has ruled that a plaintiff who desires to appeal under the death knell doctrine must show not only that his own claim is not practicable on an individual

basis, but that "it is highly unlikely that any member of the purported class has a claim justifying separate litigation." *Hooley* v. *Red Carpet Corporation,* 549 F.2d 643, 645 (9th Cir. 1977). As shown above (see p. 25), denying respondents an immediate appeal because other persons may intervene would deny respondents their right to obtain any appellate review on a question determinative of their ability to prosecute their own individual claim. The *Hooley* approach will increase multiplicity of activity by encouraging intervention, and intervention will foster rather than avoid piecemeal appeals for the reasons shown above.

The *Hooley* doctrine is not subject to easy application and would seriously complicate the litigation. Identification of "economically viable" claims of possible intervenors who have not in fact appeared is a highly uncertain endeavor. Such a determination is especially difficult in light of the very extensive effort and enormous expense frequently required for vigorous litigation of substantial claims under statutes such as the federal securities and antitrust laws.* Thus, in *duPont Glore Forgan Inc.* v. *American Telephone & Telegraph Co.,* 69 F.R.D. 481 (S.D. N.Y. 1975), Judge Edward Weinfeld found that "economic reality" would prevent Monsanto Company from proceeding solely on its individual claim of $130,000:

> "This observation is pertinent to the response by newly retained counsel for plaintiffs to the court's inquiry why Monsanto, itself no corporate pigmy, would not,

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* See discussion in Kalven & Rosenfield, *The Contemporary Function of a Class Suit,* 8 U.Chi.L.Rev. 684, 684-5 (1941). The authors analyze the plight of persons who purchased part of a debenture issue of Insull Utilities Investments and show that the holder of a $10,000 claim could not individually sustain the expenses of what would have had to be a $60,000,000 lawsuit. *Id.* at 685, including n.4.

without class action determination, prosecute its claim, which amounts to $130,000. Counsel's reply was that, while Monsanto was willing to continue to pay disbursements which, to date, have been substantial, the time-cost factor of legal fees in view of the vigor of defendants' opposition, made it uneconomical to proceed with the suit on an individual basis even assuming an ultimate recovery—in fact, Monsanto would, if required to proceed on an individual basis, forego its claim. Recent experience with legal charges and their computation suggests that counsel's statement was not exaggerated. Thus, the assertion that this action will not go forward at all if class action status is denied is plausible. The hard fact is that economic reality indicates the likelihood that unless this action is permitted to proceed as a class suit, it is the end of this litigation." *Id.* at 487 (footnote omitted)

In *Windham* v. *American Brands, Inc.*, 539 F.2d 1016, 1021 n.1 (4th Cir. 1976), the Court stated: "The hope of recovering even three times $16,000 . . . would hardly lead a prudent man to begin an anti-trust suit." See also, the discussion of the extensive work involved in litigating a substantial securities laws claim in *Blank* v. *Talley Industries, Inc.*, 390 F.Supp. 1 (S.D.N.Y. 1975).

At minimum, the *Hooley* doctrine would require extensive and time consuming discovery in federal securities litigation concerning the identities of class members, the size of individual claims, the cost of litigating, and the financial ability and willingness of any class member to intervene.* The District Court would apparently have to

* It should also be noted that the size of an individual claim may not indicate the likelihood of intervention where, as here, the District Judge has already evinced a lack of sympathy for plaintiffs' position.

consider the need for, propriety of, language of, and proper distribution of any notice to class members requesting such information. See, *Hooley* v. *Red Carpet Corp., supra,* 549 F.2d at 646. Court approval of communications with class members would be required to assure that such communications are not subject to attack under rules prohibiting solicitation of litigation by counsel. See, *e.g.,* American Bar Association Code of Professional Responsibility, DR 2-103(A), DR 2-104(A); Moore, Federal Practice, Manual for Complex Litigation, §1.41 (1977). See *Carlisle* v. *LTV Electrosystems, Inc.,* 54 F.R.D. 237, 240 (N.D.Tex. 1972), *appeal dismissed* (No. 72-1065, 5th Cir., June 23, 1972) (unreported opinion).

(f) *The Court of Appeals Had Ample Grounds for Determining That the Death Knell Doctrine Was Applicable*

The Eighth Circuit's holding that the death knell doctrine applies is strongly supported by extensive material in the record concerning respondents' economic condition and prospective costs of the litigation, and by counsel's representation that respondents could not proceed solely on their individual claim. Respondents' loss was approximately $2,650 (A 117), and respondents had been advised by counsel that the out-of-pocket expenses alone of the action might well exceed $15,000. (A 185-86) Cecil and Dorothy Livesay had salaries of $16,000 per year and $10,000 per year, respectively. (A 128) Out of a total net worth of approximately $75,000, only $4,000 was in cash and the remainder was equity in the Livesay's home and investments. (A 127-31; 138-39, 142) At the time

of their depositions, the Livesays had two children, aged 18 and 3, the older of whom was about to begin college. (A 79-80)

Cecil Livesay originally stated at his deposition that he would not seek to recover his individual loss if the Court did not certify the class. (A 68-69) Subsequently, he stated that "I couldn't give a yes or no" answer to such question, but would follow his attorneys' advice on whether he should proceed. (A 72-73) The Eighth Circuit was apprised during the appeal that respondents' counsel believed continuance of the action on the individual claims made no economic sense and that counsel could not advise respondents to continue in such a situation. (Reply Brief for Appellants-Petitioners, p. 5.)

Respondents' former counsel stated at the evidentiary hearing on the class motion that he had been retained by three class members who had substantial claims and who had indicated willingness to share the expenses of the litigation. (A 133-35; A151-53) The record does not, however, support a finding that such individuals ever made any binding or firm commitment to share such expenses. (See A 135, A 151-53) Respondents' present counsel advised the Eighth Circuit that they had not been retained to represent any of the persons described by respondents' former counsel and that they knew of no class member who had stated a willingness to intervene in the action. (Reply Brief for Appellants-Petitioners, pp. 5-6)

The Eighth Circuit recognized the preferability of a procedure where the District Court makes the initial finding that the death knell has rung, but noted that such a finding is not an absolute requirement when, as in the present case, the record is adequate for such a determination by the Court of Appeals. (Pet. Cert. p. A 15 n.5; 550

F.2d at 1110)* Moreover, the District Court did find after the evidentiary hearing on the class motion that an immediate appeal under the death knell doctrine would be appropriate if it ruled against class status. (A 166) Such finding is also implicit in Judge Wangelin's stay of substantive discovery pending resolution of the class issues, since there would be no reason for such a stay if the District Court believed the action would continue even if class status were denied.

Petitioners' argument that only the interests of respondents' counsel are truly at stake is false. While an attorney's unwillingness to prosecute a small claim on a contingent basis may reflect his own evaluation of whether he can sustain such an effort economically, the ultimate interest affected is that of the potential client because it is the client who will receive no protection if the unavailability of a class action renders it unfeasible for any attorney to represent him.**

Nor should the Court assume that respondents would receive a District Court award of attorneys fees if they

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* This Court and the Second and Sixth Circuits have taken judicial notice of the fact that certain plaintiffs' claims were so small as to render prosecution absent class certification impracticable. *E.g., Eisen IV,* 417 U.S. at 161; *Ott* v. *Speedwriting Publishing Co., supra,* 518 F.2d at 1149; *Green* v. *Wolf Corp.,* 406 F.2d 291, 295 n.6 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969).

** Punta Gorda's analysis of the considerations to be weighed in determining the feasibility of proceeding on an individual claim after denial of class status is an exercise in sheer and unsupported speculation. See Brief for Punta Gorda, pp. 13-19. Such speculation deserves little weight as against the concrete reality of the substantial resources which would have to be expended in prosecuting the individual claim to a conclusion before an appeal on the class question could be taken, and the risk of a total loss of such resources and denial of attorneys' fees if class status is not ultimately restored.

proceeded on their individual claim. An award of attorneys fees payable by defendants in connection with a recovery on respondents' claims under the Securities Act of 1933 would not be available if respondents settled these claims individually (see Section 11(e) of such Act, 15 U.S.C. §77k(e)), and the Courts have held that the plaintiff must establish that the defense bordered on frivolity in order to obtain an attorneys fee on an individual claim under that Act. *E.g., Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F.2d 1281, 1309 n. 33 (2d Cir. 1973); *Can-Am Petroleum Co.* v. *Beck,* 331 F.2d 371, 374 (10th Cir. 1964). Given the lack of statutory authorization for an attorneys' fee award on a non-class claim under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), an award of attorneys' fees to a plaintiff suing on an individual claim under that section would be unlikely unless the rarely applied "bad faith" exception were applicable. See, *e.g., Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 210 n.30 (1976); *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975); *Straub* v. *Vaisman & Co.,* 540 F.2d 591, 599-600 (3d Cir. 1976); *Hail* v. *Heyman-Christiansen, Inc.,* 536 F.2d 908 (10th Cir. 1976).

3. The Collateral Order Doctrine Provides Alternative Bases for Allowing Respondents an Immediate Appeal From the Decertification Order

As mentioned above, the death knell doctrine falls comfortably within the collateral order doctrine. Respondents took the position below that additional grounds exist for predicating jurisdiction on the collateral order doctrine. Respondents submit that the Court should affirm the Eighth Circuit decision on such grounds if the Court should decide that appellate jurisdiction is not sustainable under the narrower death knell doctrine.

The collateral order doctrine allows immediate appeal from orders which do not terminate the entire litigation when they

> ". . . finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949).

Recent decisions of this Court attest to the continuing vitality of the collateral order doctrine. *E.g., Abney* v. *United States, supra,* 431 U.S. at 658; *Mathews* v. *Eldridge, supra,* 424 U.S. at 331 n.11 (1976); *Eisen IV, supra,* 417 U.S. at 170-71.

The order below meets all the requirements of the collateral order doctrine. The order finally determines respondents' right to bring this action as a class action since there can be no change in facts which will lead Judge Wangelin to change his decision that respondents have failed to prosecute the litigation. Furthermore, the issues raised on the appeal are independent of the merits. No investigation of the merits by the Eighth Circuit was necessary in order to determine whether or not Judge Wangelin abused his discretion by decertifying the class for alleged unreasonable delay in prosecuting the litigation.

Moreover, absent class members will be denied important rights* without any effective appellate review absent an immediate appeal from the decertification.

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* Certain Courts may have taken conflicting positions on whether the collateral order doctrine requires a question the resolution of which will impact upon other cases. Compare *In re Cessna Dis-*

First, class members who would prefer to exercise their right under Rule 23 to remain passive (see discussion above, pp. 28-9) will be forced to intervene immediately after decertification to protect their individual claims against the running of the statute of limitations. Respondents' claims under Section 11 and 12(2) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §77k, 771(2), are subject to a limitation period of one year from the date upon which discovery of misleading omissions "should have been made by the exercise of reasonable diligence" and to an absolute three-year limitation. Section 13 of the 1933 Act, 15 U.S.C. §77m. Respondents were actively investigating a lawsuit against petitioners in May-June 1973, and the lawsuit was commenced in July 1973. While the statute of limitations was tolled by commencement of the class action, it began running as to absent class members from the date of decertification. *E.g., American Pipe and Construction Co.* v. *Utah, supra; Eisen IV*, 417 U.S. at 176 n.13. As of such date, class members had approximately nine months within which to bring suit under Sections 11 and 12(2). The likelihood that respondents could litigate their individual claim and reinstate the class on appeal within nine months was virtually nil.

The statute of limitations would not bar continuation of the class action if the class denial is reversed on an appeal subsequent to litigation of individual claims. *United Airlines* v. *McDonald, supra,* 97 S.Ct. at 2468-69. See also

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tributorship Antitrust Litigation, 532 F.2d 64, 67 (8th Cir. 1976) with *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.,* 455 F.2d 770, 773 (2d Cir. 1972). This Court has in fact cited *Cohen* v. *Beneficial Industrial Loan Corp., supra,* in support of the appealibility of issues which are of major importance in the action but which would have no impact beyond the immediate litigation. *E.g., Stack* v. *Boyle, supra,* (allowing immediate appeal from order refusing to reduce bail); *Roberts* v. *United States District Court, supra.*

Gelman v. *Westinghouse Electric Corp.,* —— F.2d —— (No. 77-1170, 3d Cir., June 6, 1977) (opinion not yet reported); *Jimenez* v. *Weinberger, supra,* 523 F.2d at 696. However, this Court's opinion in *United Airlines* v. *McDonald* leaves open the possibility that the limitations period may run on individual claims prior to the date of determination of the appeal if the appeals process ultimately affirms the denial of class status. See discussion, 97 S.Ct. at 2468-69. Such a prospect is suggested in *Knable* v. *Wilson,* 23 F.R.Serv.2d 146, 149 (D.C. Cir. 1977) where the Court stated that the limitations problem of absent class members could only be rectified "by a reversal enabling unjoined claimants to come in as members of the class." Consequently, absent class members who prefer to exercise their right to remain passive may be forced to intervene to protect their position, only to discover at a later date that intervention was unnecessary because the appeals court does in fact reverse the denial of class status.

Absent an immediate appeal, other class members may also be irreparably injured by loss of their standing to seek class relief in this action if respondents should settle their claim prior to determination of the merits. A number of this Court's recent rulings have indicated that class relief might not be available on appeal if the plaintiff's claim became moot prior to class certification. *E.g., Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976); *Sosna* v. *Iowa,* 419 U.S. 393 (1975); *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128 (1975). In *United Airlines* v. *McDonald, supra,* the Court recognized that a plaintiff may appeal a class denial after a favorable District Court decision on the merits of his individual claim (97 S.Ct. at 2469, including n.14). While that case involved an appeal after a settlement, the Court stressed

that the "settlement" had occurred only after a victory on the merits and after the guiding principles for damage computation had been established. *Id.* at 2469 n.14. Since a settlement typically moots whatever issues are associated with the individual claim,* *United Airlines* v. *McDonald* may not resolve all question as to whether class issues could be appealed were determination of the merits not to have preceded the settlement.

4. Appellate Jurisdiction May Also Be Sustained Under *Gillespie* v *United States Steel Corp.*, 379 U.S. 148 (1964)

In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), this Court declared that a Court of Appeals may hear an appeal in a case of "marginal finality" where the questions presented are "fundamental to the further conduct of the case":

> "We think that the questions presented here are equally 'fundamental to the further conduct of the case.' It is true that if the District Judge had certified the case to the Court of Appeals under 28 U.S.C. §1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in §1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. §1291 (1958 ed.). We therefore proceed to consider the correctness of the Court of Appeals' judgment." 379 U.S. at 154.

According to Professor Moore:

> ". . . if an order is arguably reviewable by virtue of some other provision, and the question presented is of a kind that would be certifiable under §1292(b), the court of appeals can, if it finds the order in fact to be non-appealable, proceed to determine the question on the assumption that the district court would or should have certified it." *9 Moore, Federal Practice,* ¶110.22[3], p. 263 (2d ed. 1975).

* See, Justice Powell, dissenting in *United Airlines* v. *McDonald*, 97 S.Ct. at 2473.

The issues raised in this appeal are indeed "fundamental to the further conduct of the case." The record supports respondents' position that their claim is not economically viable on an individual basis, and as shown above, important rights of respondents and class members may be irretrievably lost absent an immediate appeal. Moreover, at the conclusion of the evidentiary hearing on the class motion, Judge Wangelin stated his opinion that an immediate appeal would be appropriate if he refused to certify the class, and that such an immediate appeal might materially advance the ultimate termination of the litigation. (A 166) In consequence, it would be appropriate for the Court to affirm the Eighth Circuit's assumption of jurisdiction under the *Gillespie* decision in the event it should regard the District Court order as one of "marginal" finality.

5. Conditioning an Immediate Appeal on District Court Certification Under 28 U.S.C. §1292(b) Would Improperly Deny Respondents Their Rights Under 28 U.S.C. § 1291

28 U.S.C. Section 1292(b) states as follows in relevant part:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an imme-

diate appeal from that order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order."

Respondents submit that the Third and Seventh Circuits have erred in holding that discretionary District Court certification under Section 1292(b) is the sole route for obtaining an immediate appeal from denial of class status. *E.g., Katz* v. *Carte Blanche Corp., supra; Anschul* v. *Sitmar Cruises, Inc., supra.* If the decision decertifying the class is in fact a "final decision" within the meaning of Section 1291, respondents are entitled to an immediate appeal from such decision as of right. Allowing an immediate appeal only if the District Court certifies the issue and the Court of Appeals agrees to accept the appeal improperly conditions the exercise of such right on two separate discretionary decisions.*

While defendants cite certain cases where denials of class status have been certified for an interlocutory appeal, the availability of an appeal under Section 1292(b) in any given situation is highly uncertain. Thus, Judge Gibbons, the author of the opinion which established District Court certification as the sole method of obtaining immediate

* In *Share* v. *Air Properties, Inc., supra,* 538 F.2d at 281 n.1, the Court stated:

"Nor does certification under 28 U.S.C. §1292(b) or mandamus solve the problem, as *Hackett* suggests. The very error with which we are concerned is that of the district judge, and it is precisely in those cases where he fails to certify under §1292 (b) where the harm will be manifest. For those cases in which there has been error and no section 1292(b) certification, mandamus, as traditionally formulated, imposes too high a standard to give adequate protection to plaintiffs."

appeal from a denial of class status in the Third Circuit in damage actions (*Hackett* v. *General Host Corp., supra*), now complains that "a plurality of this court *en banc* has demonstrated a determination to make the §1292(b) route a practical impossibility." *Gardner* v. *Westinghouse Broadcasting Co.,* 559 F.2d 209, 221 (3rd Cir. 1972) (dissenting opinion), *cert. granted,* December 5, 1977, 46 U.S.L.W. 3373. See also, *Anschul* v. *Sitmar Cruises, Inc., supra,* 544 F.2d at 1372 n.4 (dissenting opinion) (". . . certification of appeals under section 1292(b) is not a common practice encouraged in this circuit or most others"); *Link* v. *Mercedes Benz of North America, Inc.,* 550 F.2d 860, 873-74 (3rd Cir. 1977) (dissenting opinion), *cert. denied,* U.S. (1977).

Moreover, section §1292(b) is limited to appeals from "a controlling question of law." Courts may diverge on whether such requirement is met where the appeal involves an issue as to which the District Court has discretion. Compare *J.C. Trahan Drilling Contractor, Inc.* v. *Sterling,* 335 F.2d 65 (5th Cir. 1964), with *Katz* v. *Carte Blanche Corp., supra,* 496 F.2d at 752-56. See also, 9 Moore, Federal Practice, ¶110.22[2], p. 261 (2d ed. 1975); Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. §1292(b),* 88 Harv.L.Rev. 607, 618 n.57 (1975). Consequently, it would not be safe to assume that District Judges or Circuit Courts will regard a denial of class certification as appealable under section 1292(b) in all instances where the denial of certification does, in fact, terminate the litigation.

6. Petitioners' Argument That the Court Should Adopt a Rule Aimed at Discouraging Class Actions Misdescribes the History of Experience With Class Actions and Ignores the Important Public Purposes Served by Rule 23

Petitioners launch an attack on class actions in general, reciting numerous criticisms which have little basis in fact

and which ignore the extent to which the class action remedy has served its intended purposes.

Petitioners stress an alleged *in terrorem* effect of class actions, but ignore the fact that absent Rule 23, the very real *in terrorem* considerations favoring defendants would effectively prevent most persons with modest claims from ever resorting to the courts to obtain relief.

Actions like the case at bar involving small claims under the federal securities laws are a prime example. Defendants in such actions typically are corporations having extensive resources and the ability to retain high caliber law firms to wage vigorous defenses. Unlike other types of litigation where the plaintiff often has specific knowledge of defendants' wrongdoing, the defrauded shareholder is normally remote from activities within the defendant company and not in possession of the evidentiary facts needed to prove liability. Extensive discovery must be conducted on plaintiff's behalf, including detailed analyses of voluminous documents relating to the financial condition of the subject company and numerous depositions of the officers of such company and its accountants. Since the fee which an attorney could charge for representing a small claimholder in such an action could never compensate the attorney for his efforts in vigorously litigating the action, such holders are effectively denied any redress unless the case can be brought as a class action.*

Even where class relief is sought, there is often a powerful *in terrorem* effect working to defendants' advantage. The large companies which defend such actions can devote substantial resources to the task, while plaintiff's attorneys must forego compensation until a successful result in the action. Well financed defendants will frequently cause

* See cases and article cited above, pp. 33-34.

plaintiffs to spend years litigating the class question or other preliminary matters—as they have in this action—thus retarding the progress of the law suit on the merits.

Recent disclosure of scandals such as those involving the Equity Funding Corporation, National Student Marketing, and the Franklin National Bank failure highlight the need of small shareholders for an effective means of obtaining representation. The Securities and Exchange Commission ("SEC") has stated publicly that in view of its own limited resources the activities of the private bar are essential to protection of investors*, and this Court has recognized that private securities actions serve the prophylactic purpose of enforcement of the securities laws for the protection of all investors. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 382 (1970); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964).

Coopers' insistence that small claim-holders are less deserving of protection by the Courts than are large claimholders betrays a callous attitude which is diametrically opposed to the purposes and values underlying Rule 23. See, *e.g.*, Coopers' Brief, pp. 27-28. The authors of Rule 23 were vitally concerned to avoid "freezing out the people—especially small claims held by small people. . . ." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv.L.Rev. 356, 398 (1967). Indeed, when analyzed in human terms, it is apparent that a two thousand dollar loss may have a far more serious impact upon a person of modest means than a $200,000 loss may have on a multi-

* See SEC *amicus* brief cited at length in *Dolgow* v. *Anderson*, 43 F.R.D. 472, 482-84 (E.D.N.Y. 1968). Professor Loss has stated: "The ultimate effectiveness of the federal [securities] remedies . . . may depend in large part on the applicability of the class action device." 3 Loss, *Securities Regulation* p. 1819 (2d ed. 1961).

million dollar corporation. Such a recovery could, for example, enable a small claim-holder to meet pressing bills or provide respondents with college tuition for their children.* Underlying Coopers' argument is a contempt for the needs and interests of persons having limited resources. Respondents respectfully submit that such contempt has no proper place in our legal system.

Petitioners complain that an *in terrorem* effect of class actions induces settlements.** Certainly the prospect of liability and damages tends to induce settlements,*** be it in individual actions or in class actions. However, there is no reason to suppose that such pressures are unfair. If petitioners have violated the securities laws, injuring thousands of investors, it is appropriate that a suit to recoup the loss should create proportionate pressure. As Professor Dole has pointed out, class suits based on meritorious claims are quite different from "strike suits" based on frivolous claims. Rule 56 provides safeguards against the latter. See Dole, *The Settlement of Class Actions for Damages,* 71 Colum.L.Rev. 971, 974 (1971).

Petitioners' claim that in consequence of an *in terrorem* effect all class actions are settled simply is not true. Many class actions have proceeded to trial. *E.g., Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F.2d 1281 (2d Cir. 1973); *Beecher* v. *Able,* CCH Fed. Sec. L. Rep. ¶94,450 (S.D.N.Y. 1974); *Gould* v. *American Hawaiian Steamship Co.,* 362 F.Supp.

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* See A 79-80.

** Coopers Brief, p. 31.

*** The Courts have long recognized that settlements are to be encouraged as a matter of public policy. *E.g., Airlines Stewards and Stewardesses Association* v. *American Airlines, Inc.,* 455 F.2d 101, 109 (7th Cir. 1972); *D.H. Overmeyer Co.* v. *Loftin,* 440 F.2d 1213, 1215 (5th Cir. 1971).

771 (D.Del. 1973). *judgment vacated,* 535 F.2d 761 (3rd Cir. 1976); *Dolly Madison Industries, Inc. Litigation,* No. 70-2585 (E.D.Pa. 1973) (settled after four months of trial); *Stamps* v. *Detroit Edison Co.,* 365 F.Supp. 87 (E.D.Mich. 1973); *Kohn* v. *American Metal Climax, Inc.,* 322 F.Supp. 1331 E.D.Pa. 1971), *aff'd in part, rev'd in part,* 458 F.2d 255 (3d Cir. 1972), *cert. denied,* 409 U.S. 874 (1973); *Feit* v. *Leasco Data Processing Equipment Corp.,* 332 F.Supp. 544 (E.D.N.Y. 1971); *Robinson* v. *Lorillard Corporation,* 319 F.Supp. 835 (M.D.N.C. 1970), *aff'd in part rev'd in part,* 444 F.2d 791 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971); *Siegel* v. *Chicken Delight, Inc.,* 311 F.Supp. 847 (N.D.Cal. 1970), *aff'd in part, rev'd in part,* 448 F.2d 43 (9th Cir. 1971), *cert denied,* 405 U.S. 955 (1972); *Brennan* v. *Midwestern United Life Insurance Company,* 286 F.Supp. 702 (N.D.Ind. 1968), *aff'd,* 417 F.2d 147 (7th Cir. 1969), *cert. denied,* 397 U.S. 989 (1970); *Escott v. BarChris Construction Corp.,* 283 F.Supp. 643 (S.D.N.Y. 1968).

Nor is there any indication that the proportion of settled class actions exceeds the percentage of settlements of non-class actions. Only 7.8% of *all* federal court civil cases which were terminated during the year ending June 30, 1977 (other than land condemnation cases) reached the trial stage* and a Congressional study has found that the proportion of class actions tried in the District of Columbia Circuit "is consistent with the proportion for all civil actions" in the same district.**

Petitioners' arguments rest upon surmise. That surmise lost whatever credibility it possessed with publication of an empirical study of class actions by the Commerce Committee of the United States Senate in 1974. Committee on

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* 1977 Annual Report of the Director, Administrative Office of the United States Courts, p. A-24.

** Committee on Commerce, United States Senate, *Class Action Study,* 93rd Cong.2d Session (1974), Committee Print, p. 10.

Commerce, United States Senate, *Class Action Study*, 93rd Cong. 2d Sess. (1974) (*"Class Action Study"*).* That study strongly refutes the argument that defendants faced with class actions are forced to settle non-meritorious claims, finding that:

> "If frivolous cases are brought, the high proportion of dismissals and summary judgments indicates that the class action is not a very effective tool for forcing settlements. Moreover, defendant attorneys interviewed indicated that if faced with a weak suit they certainly would fight it on the merits initially before agreeing to settle." *Id.*, p. 10 (footnote omitted).

In addition:

> "[i]nterviews with defendant attorneys disclosed that no more than a handful would label their opponents' cases as frivolous." *Id.*, p. 9.

Nor is there a convincing basis for belief that the costs of defending against class actions are so substantial that defendants have no recourse but to settle. A recent review of fee awards in securities class actions indicates that fees have typically represented less than 25% of the total settlement. 3 Newberg, Class Actions, pp. 1327-1343 (1977). Such fees would at minimum reflect the standard hourly rate of plaintiffs' attorney for time devoted to the action, and will often include an additional amount reflecting the contingent nature of the litigation. *E.g., Lindy Bros. Builders Inc. of Philadelphia* v. *American R & S San Corp.*, 487 F.2d 161, 167-68 (3rd Cir. 1973). If we assume a rough

* The Ninth Circuit has recognized that the *Class Action Study* constitutes the best available empirical evidence concerning the alleged *in terrorem* effect of class actions. *Blackie* v. *Barrack*, 524 F.2d 891, 899 n.15 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

equivalence between plaintiffs' and defendants' legal fees in the same action, it would appear that defendants have been settling class actions for amounts far in excess of their legal fees.

Petitioner's argument that class actions do not really benefit class members is also incorrect. Numerous examples can be given of extremely substantial class relief.* The *Class Action Study* reports that in 38% of the cases where monetary relief occurred, the recovery exceeded $1 million and in 13% of such cases damages exceeded $5 million. *Id.*, p. 27. Recoveries in labor pension fund cases ranged from $6 million to $300 million, including prospective relief. *Id.*, p. 21. Furthermore, the *Class Action Study* found that class recoveries have not been consumed by attorneys' fees, notice costs, and administrative expenses. *Id.*, pp. 17, 29.

Nor are class actions the burden to federal courts described by petitioners. Recent statistics show that class actions represented only 2.4% of all civil cases filed in fiscal 1977 and only 4.1% of all of civil cases pending, and the

* *E.g., In re Equity Funding Corp. of America Securities Litigation*, M.D.L. Docket No. 142, C.D.Cal., September 29, 1977, (approximately $60 million) (unreported order); *Arenson* v. *Board of Trade of City of Chicago*, 372 F.Supp. 1349, 1355-56 (N.D.Ill. 1974) (prospective benefits possibly in excess of $800,000,000). Recent examples of class relief in actions in which counsel for respondents participated include, but are not limited to: *In re Consolidated Pre Trial Proceedings in Ampex Securities Cases*, N.D. Cal., Master File No. C-72-360 SW ($9,000,000 settlement approved on October 6, 1976 in unreported decision) (respondents' counsel served as co-lead counsel); *Seiden* v. *Nicholson*, 72 F.R.D. 201 (N.D.Ill. 1976) ($9.5 million settlement) (respondents' counsel were members of plaintiffs' steering committee); *City of New York* v. *Darling-Delaware* and consolidated cases, 1977-2 CCH Trade Cases ¶61,802 (S.D.N.Y. 1977) ($5.1 million); *Dennis* v. *Saks & Co.* and consolidated cases, S.D.N.Y., 77 Civ. 4419 ($5.2 million settlement approved October 6, 1976 in an unreported decision); *502 Broadway Corp., et al.* v. *MacArthur*, D.Del. Nos. 75-172 and 75-173, ($1.3 million settlement approved on March 18, 1977 in an unreported decision) (respondents' attorneys were lead counsel).

number of class action suits filed decreased by 10.9% from the prior year.* The great bulk of such cases are civil rights (including prisoner petition), consumer, and labor cases. *Id.* at 126-127. Securities and anti-trust actions represented only 5.5% and 7.3% respectively of the civil class actions commenced in fiscal 1977. *Ibid.*

The *Class Action Study* found that class actions in the District of Columbia "do not appear to place an overwhelming burden on the federal district court",** and that "most class actions do not take markedly longer from filing to disposition in district court than do civil actions in general." *Class Action Study,* pp. 4 and 12. When burdens do arise, it is respectfully suggested that they often result from defendants' employing tactics such as those deplored by the Eighth Circuit in the present case.

Similar allegations of unfairness and *in terrorem* effect were raised several years ago by the Corporate Section of the American Bar Association, but upon investigation were rejected by other Sections (including the Insurance, Negligence and Compensation Law Section in two lengthy reports),*** and by an Ad Hoc Committee appointed to study class actions. The Committee resolved that "no restrictive changes should be made at this time in the provisions of

* Annual Report of the Director for 1977, Administrative Office of the United States Courts, p. 121. Moreover, the number of class action litigations actually conducted are substantially less than the number of class action complaints filed, since securities and anti-trust class actions are often consolidated with numerous other class actions having common issues. See, *e.g., Class Action Study,* p. 6.

** At the time of the *Class Action Study* the District of Columbia had the fourth largest number of class actions in the country. *Class Action Study,* p. 3.

*** Insurance, Negligence and Compensation Law Section (ABA), *Comments on Recommendations Re Consumer Class Actions for Monetary Relief. Parts I and II* (1974).

Rule 23 of the Federal Rules of Civil Procedure . . . and any consumer class action legislation adopted by a state in the immediate future should be patterned after Federal Rule 23." That resolution, rejecting accusations of unfairness and endorsing Rule 23, was subsequently approved at the 1974 convention of the American Bar Association and remains the official position of the Association.*

The importance of securities class actions over the past decade in extending shareholders' rights and elevating the standards to which persons connected with securities offerings are held has been confirmed by the Association of the Bar of the City of New York:

> "The precise effect which class actions have had upon the financial community cannot be measured. It is no overstatement that cases such as *Escott* v. *Barchris Construction Corp.,* 283 F.Supp. 643 (S.D.N.Y. 1968) and *Feit* v. *Leasco Corp.,* 332 F.Supp. 544 (E.D.N.Y. 1971) have had a profound—and beneficial—influence upon the diligence of directors, underwriters, accountants, lawyers and others connected with the public offering of securities." *Class Actions—Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements,* Association of the Bar of the City of New York (1973), footnote, p. 16.

In light of such favorable experience, in 1975 New York State adopted a class action law designed to broaden the availability of the type of relief provided by Rule 23. New York State Civil Practice Law and Rules §§ 901-09.

Other disinterested and learned commentators have applauded both the promise and the operation of Rule 23 in fairly and efficiently securing relief from serious violations

* ABA, *American Bar News,* September 1974, p. 6.

of law affecting numerous persons. *E.g.*, Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307 (1973); Homburger, *State Class Actions and the Federal Rule*, 71 Colum.L.Rev. 609 (1971); Miller, *Problems in Administering Judicial Relief In Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501 (1972).*

POINT II

If This Court Should Decide That the Eighth Circuit Lacked Jurisdiction Over the Appeal, the Court Should Remand This Case to the Eighth Circuit For Consideration of Respondents' Mandamus Petition.

The Eighth Circuit dismissed respondents' mandamus petition as moot since it granted the full relief requested on appeal. Should this Court determine that the Eighth Circuit lacked jurisdiction of the appeal, respondents request the Court to remand the proceedings to the Eighth Circuit for reconsideration of respondents' mandamus petition.**

The District Court predicated decertification on delay of the litigation when, as found by the Court of Appeals, the District Court's own decisions—including its refusals to comply with the prior mandate of the Eighth Circuit and acquiescence in petitioners' efforts to delay—prevented the

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* Professors Hazard and Miller are respectively members of the law faculties at Yale and Harvard, and Professor Homburger is Professor of Law Emeritus at the State University of New York at Buffalo. Professor Miller is co-author of Wright and Miller, *Federal Practice and Procedure*.

** The fact that respondents have not cross-petitioned for certiorari with respect to dismissal of the mandamus petition does not deprive this Court of power to provide the alternative relief requested. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); *Langnes* v. *Green*, 282 U.S. 531, 535-540 (1931).

action from moving forward. Respondents submit that the District Court's ruling constitutes an exceptional abuse of judicial authority justifying issuance of a writ of mandamus. See, *e.g.*, *Will* v. *United States*, 389 U.S. 90, 95 (1967). In light of the Eighth Circuit's unanimity in holding that the District Court abused its power, respondents submit that the Court of Appeals should have an opportunity to reconsider issuance of the writ if relief on appeal is unavailable.

POINT III

The Court of Appeals Acted Within the Proper Scope of Its Authority in Reversing the District Court's Decertification Order.

1. The Court of Appeals Properly Held That the District Court Abused Its Discretion In Decertifying the Class For an Alleged Failure to Prosecute the Litigation

This Court has emphasized that a District Court's discretion must be guided by "'sound legal principles'" and that the concept of discretion does not shield a District Court from "thorough appellate review." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975). Thus, numerous cases recognize that a Court of Appeals may reverse a District Court order denying class status if the District Court has abused its discretion. *E.g.*, *Guerine* v. *J & W Investment, Inc.*, 544 F.2d 863, 865 (5th Cir. 1977); *Windham* v. *American Brands, Inc.*, 539 F.2d 1016, 1021-22 (4th Cir. 1976); *Samuel* v. *University of Pittsburgh*, 538 F.2d 991, 996-97 (3rd Cir. 1976). Abuse of discretion occurs when a District Court finding is plainly unsupported by the record. *E.g.*, *Windham* v. *American Brands, Inc.*, *supra*; *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974). Reversal is also proper when the decertification

order was based on application of impermissible criteria (*e.g., Gay* v. *Waiters and Dairy Lunchmen's Union,* 549 F.2d 1330, 1332 (9th Cir. 1977); *Carey* v. *Greyhound Bus Co.,* 500 F.2d 1372, 1379-81 (5th Cir. 1974).

As shown in detail in the Statement of the Case above, Judge Wangelin predicated decertification on a clearly erroneous description of the facts.* Thus, the District Court stated that respondents did not institute discovery to obtain names and addresses of class members until July 1976, when, pursuant to a prior understanding, respondents had sought such information from Punta Gorda promptly upon the Court's approval of the form of notice of pendency of class action in April 1976. (A 176-77, 215-16)** The District Court also stated that the delay between the class action hearing and class certification resulted from substitution of counsel for respondents (Pet. Cert., p. A-7), when Judge Wangelin did not decide that new counsel was required until he certified the class (A 170-72).

The decertification opinion incorrectly attributed all delays in the action to inactivity by respondents (Pet. Cert., A-7, A-8), while totally ignoring (i) Punta Gorda's willful effort to delay production of names and addresses of class members on the pretext that the transfer records were not

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* In this connection, it should be noted that the facts as to what occurred are not in dispute and are clearly set forth in the District Court records. In consequence, the Court of Appeals was in as good a position as the District Court to determine whether the respondents had unduly delayed the litigation. See discussion in *Weeks* v. *Bareco Oil Co.,* 125 F.2d 84, 93 (7th Cir. 1941).

** Coopers did not move to decertify until after respondents sought District Court assistance for their effort to obtain the transfer records. See discussion above, pp. 11-12. It is astonishing that respondents' very effort to obtain names and addresses of class members should have given rise to almost immediate decertification. Such result is especially surprising in light of the four month period taken by the District Court to approve the form of class notice.

within its custody (A 205-206; A 215-216);* (ii) petitioners' continuing efforts to bring about reconsideration of class issues which had already been litigated (*e.g.,* A 94, 178-80); (iii) respondents' repeated efforts to lift the stay on substantive discovery, which efforts were continually rejected at petitioners' request by the District Court in violation of the Eighth Circuit's November 15, 1974 mandate (*e.g.,* A 86, 96, 100, 103, 175, 186-90); (iv) the delay in the lawsuit which resulted from the District Court's allowing over one year to elapse between the filing of the class motion and its determination (A 5, 11); (v) the four months which elapsed between the submission of the proposed notice of pendency of class action to the Court and the Court's approval of such form (A 14, 194); and the fourteen extentions of time (totalling approximately 190 days) obtained by petitioners during the litigation. (Pet. Cert., p. A-20; 550 F.2d at 1112; See A 2-6, 8, 10, 13)

In addition, the District Court utilized improper legal criteria in decertifying the class. First, any delays occuring prior to the appearance of new counsel for respondents should have no bearing on a motion to decertify filed fourteen months after new counsel had appeared. See, *duPont Glore Forgan, Inc.* v. *American Telephone & Telegraph Co.,* 69 F.R.D. 481, 483-84 (S.D.N.Y. 1975). See also the condemnation of the practice of repeatedly asserting identical grounds for decertification in *Kramer* v. *Scientific Control Corp., supra,* 67 F.R.D. at 99. Second, the District Court acted improperly in ruling that respondents had unduly

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* In *Kramer* v. *Scientific Control Corp.,* 67 F.R.D. 98, 101 (E.D. Pa. 1975), *aff'd in part, rev'd in part on other grounds,* 534 F.2d 1085 (3rd Cir. 1976), *cert. denied sub nom. Arthur Andersen & Co.* v. *Kramer,* 429 U.S. 830 (1976) the Court refused to deny class status for undue delay in identifying class members when the delays resulted in large part from defendants' refusal to furnish records voluntarily.

delayed in seeking to discover the identities of class members at a time when the Court had not yet decided whether the relevant information could be determined simply by review of Punta Gorda's transfer records.* Prior to deciding such question, the District Court had no basis for determining how time consuming the effort to identify class members would be. Since Judge Wangelin has now decided that the class notice should be sent, at least in the first instance, only to "initial register[ed] owners of [the relevant] stocks and debentures," respondents' expectation that extensive discovery would not be necessary to identify the recipients of the notice of pendency has proved to be correct (see Appendix A hereto).**

2. The Court of Appeals Properly Reversed the Order Decertifying the Class

The Eighth Circuit properly determined that the District Court decertified solely on the alleged ground that respon-

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* Such question was submitted to the District Court well before resolution of the decertification motion. See discussion above, p. 11. The *Class Action Study, supra,* noted that "a significant factor" with respect to the feasibility of individual notice in class actions was "the relative ease with which the class members were identified from records within the defendant's possession." *Class Action Study,* p. 16.

** Respondents' reasonable basis for believing that the names and addresses required for mailing the notice of pendency were those of the first registered owners after the underwriters is shown by the many cases in which courts have approved such method of notice. *E.g., In re National Student Marketing Litigation* v. *The Barnes Plaintiffs,* 530 F.2d 1012, 1014-15 (D.C.Cir. 1976); *In re Four Seasons Securities Laws Litigation,* 63 F.R.D. 422, 427, 430 (W.D.Okla. 1974), *aff'd,* 525 F.2d 500 (10th Cir. 1975). Compare *In re Penn Central Securities Litigation,* 560 F.2d 1138 (3rd Cir. 1977) and *In re Franklin National Bank Securities Litigation,* 73 F.R.D. 25 (E.D.N.Y. 1976), *appeal pending,* which cases were decided at a date subsequent to the decertification.

dents unduly delayed in prosecuting the litigation. (Pet. Cert., pp. A-7, A-8) Having found that decertification on such ground was an abuse of discretion, the Court of Appeals reversed the decertification order and remanded the case for further proceedings consistent with its opinion. (Pet. Cert., p. A-21; 550 F.2d at 1113) Such procedure is totally unlike that employed in *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977), where the Court of Appeals certified the class in the first instance after plaintiffs had failed to move for class certification before trial and the District Court had dismissed the class action allegations. Here, the effect of the Eighth Circuit's order is only to reestablish the certification which existed prior to the District Court's abuse of discretion in stripping the case of class status.

Furthermore, respondents submit that on the present record decertification for the alternative reasons proposed by Coopers would itself have constituted an abuse of discretion.

Thus, Coopers' argument that respondents were inadequate representatives because they failed to join underwriters and sought to hide an alleged injury to the class because of "divided loyalties" does not withstand scrutiny. (See Coopers' brief, pp. 44-46) Soon after entering the litigation respondents' present counsel informed Judge Wangelin that the interest of the class did not require joinder of underwriters because existing defendants were capable of paying any judgment and appeared to be primary wrongdoers, and because discovery against the underwriters was available without joining them as defendants. (A 183-84). Thus the joining of underwriters would merely have added to the procedural complexity of the litigation, with the prospect of creating additional opportuni-

ties for delay.* By the time of the November 4, 1975 *in camera* conference, respondents' counsel had further refined their analysis and were prepared to state that the limitation period relevant to the underwriters had expired prior to present counsel's appearing in the action.**

No hint of any finding that respondents' present or former counsel*** sought to conceal information from the District Court can be found in the decertification opinion or in any of Judge Wangelin's decisions. There is no truth

* None of the petitioners thought a sound basis for suing the underwriters existed, since they failed to implead them as third party defendants. Consequently, petitioners have no basis for contending that the interest of the class has been adversely affected by respondents' failure to sue any underwriters.

** Since respondents' former counsel had apprised the District Court at the evidentiary hearing that the limitations period had run on any claims under Sections 11 and 12(2) of the 1933 Act (A 166), the only limitations period at issue was that affecting claims under Section 10(b) of the 1934 Act and 17(a) of the 1933 Act. Petitioners conceded below that under *Vanderboom* v. *Sexton*, 422 F.2d 1233, 1236-37 (8th Cir.), *cert denied*, 400 U.S. 852 (1970) the limitations period for Section 10(b) claims would have been the period of two years from the contract of sale set forth in the *Missouri Blue Sky Law*, §409.411(e), Mo.Rev. Statute 1969, as amended. The limitations period for claims under § 17(a) is identical to that under §10(b). *E.g.*, *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 125-27 (7th Cir. 1972). Since all class members had purchased their Punta Gorda securities at the offering in May 1972, any Section 10(b) claims against the underwriters had apparently expired. Adoption of the federal tolling provision in *Vanderboom* did not preserve claims against the underwriters, because the restatement of Punta Gorda profits which revealed the misleading nature of the Prospectus occurred more than two years prior to present counsel's appearance.

*** Coopers' argument that respondents' original counsel tried to avoid an evidentiary hearing because of conflict of interest problems has absolutely no support in the record. Respondents' former counsel did not believe that Judge Wangelin had ordered an evidentiary hearing to be held but promptly sought direction on this matter from Judge Wangelin when the question was raised by petitioners. (A 98-99, 101-102)

to Coopers' accusations and not a shred of evidence to support them.

Indeed, petitioners' effort to force respondents to sue the underwriters without good cause was itself highly improper. The courts have ruled that an attorney for a class representative is entitled to use his professional judgment in determining the proper defendants to the class action. See *Dorfman* v. *First Boston Corp.*, CCH Fed.Sec.L.Rep. [1973 Transfer Binder] ¶94,155, at p. 94,637 (E.D.Pa. 1973); *Kramer* v. *Scientific Control Corp., supra*, 67 F.R.D. at 100-01 (plaintiffs' failure to sue brokerage firms held not to render plaintiffs inadequate class representatives); *Federman* v. *Empire Fire & Marine Insurance Co.*, 19 F.R. Serv. 2d 480, 484 (S.D.N.Y. 1974) (absent evidence of bad faith, class action plaintiffs have discretion to withdraw action against named defendant).

Coopers' further argument that respondents sought to delay distribution of the notice of pendency is not credible. Respondents complied promptly with the District Court's directions concerning submission of a proposed class notice and did not delay in submitting further comments to the Court with respect to such notice. (A 14, 190, 191, 193, 212) Respondents' major concern with the proposed class notice was its express refusal to define any of the issues which had been certified for class treatment. (A 212-213) Since the notice requirement in Rule 23 is designed to assure that class members not be deprived of substantial rights without due process of law, respondents believed that the notice violated applicable constitutional provisions in failing to provide class members with a description of the class action which would enable them to make intelligent decisions as to whether to opt out, intervene, or remain passive. See, *e.g.*, *Eisen IV*, 417 U.S. at 173-74; *Advisory Committee's Note to Rule 23, supra*, 39 F.R.D. at 107.

Respondents were also concerned that the net effect of the proposed notice would be further protracted litigation on class issues. Continuing litigation on class issues was a problem because Judge Wangelin apparently intended to continue the stay on substantive discovery until all such issues were resolved. In light of the Eighth Circuit's ruling on November 15, 1974, that the District Court should "promptly rule on petitioner's motion [for class determination] and remove its stay order and thereafter permit discovery to proceed on the merits" (A 107-108), respondents were justifiably concerned over prospects for further delay.

Coopers' insistence that the Eighth Circuit should have rejected class certification on grounds other than adequacy of representation is surprising in light of the limitation of the class to persons who purchased at the offering on May 2-3, 1972 and the limitation of documents alleged to be misleading to the Prospectus itself. The relative simplicity of showing predominance of common issues and manageability herein with respect to the class action issues under Section 11 of the Securities Act of 1933 is in sharp contrast with many cases certified for class treatment under the federal securities laws which have involved persons who purchased securities over many months or years, during which time numerous misleading documents were published. *E.g., Blackie* v. *Barrack, supra,* 524 F.2d at 901-08; *Seiden* v. *Nicholson,* 69 F.R.D. 681 (N.D.Ill. 1976). Thus, Coopers' arguments are routinely denied on records such as that in the present action. See, *e.g.,* discussion in *Umbriac* v. *American Snacks, Inc.,* 388 F.Supp. 265, 272-73 (E.D.Pa. 1975). Since class treatment can be limited to specific issues, sub-classes can be created, and class designation is itself conditional, the courts have recognized that they should be especially cautious about refusing class certification for management reasons. *E.g., Green* v. *Wolf Corp.,*

supra, 406 F.2d at 301; *Cusick* v. *N.V. Nederlandsche Combinatie Voor Chemische Industrie,* 317 F.Supp. 1022, 1026 (E.D.Pa. 1970); *State of Illinois* v. *Harper & Row Publishers, Inc.,* 301 F.Supp. 484, 490-91 (N.D.Ill. 1969), *aff'd,* 423 F.2d 487 (7th Cir. 1970), *aff'd,* 400 U.S. 348 (1971). See Moore, Federal Practice, Manual For Complex Litigation, §1.43, p. 49 (1977).*

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* The argument that common issues do not predominate because class members must individually show reliance is irrelevant to respondents' claims under Section 11 and 12(2) of the 1933 Act, which provisions do not require reliance by persons who purchased at the offering. See *e.g.,* Section 11(a) of the 1933 Act, 15 U.S.C. §77k(a). Individual proof of reliance under Section 10(b) is unnecessary where, as here, a cause of action is based on deceptive omissions. *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 153-54 (1972). Considerable precedent also holds that subjective reliance is unnecessary to prove a cause of action based on affirmative misrepresentation when such misrepresentation inflated the market price of the securities purchased. *E.g., Blackie* v. *Barrack, supra,* 524 F.2d at 907; *Competitive Associates, Inc.* v. *Laventhol, Krekstein, Horwath & Horwath,* 516 F.2d 811, 814 (2d Cir. 1975). Since the question of materiality is "objective" rather than subjective (*TSC Industries, Inc.* v. *Northway, Inc.,* 96 S.Ct. 2126, 2131 (1976)) and causation is shown if a misstatement or omission is material and the misleading document "was an essential link in the accomplishment of the transaction" (*Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 385), causation is also a common issue. Statute of limitations defenses are also appropriate for class treatment. *E.g., Seifer* v. *Topsy's International, Inc.,* 64 F.R.D. 714, 719 (D.Kansas 1974), *appeal dismissed,* 520 F.2d 795 (10th Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976); *Bisgeier* v. *Fotomat Corporation,* 62 F.R.D. 113 (N.D.Ill. 1972).

CONCLUSION

For the reasons given above, the Court should affirm the judgment of the Court of Appeals. If the Court should decide that the Court of Appeals lacked jurisdiction to hear the appeal, the Court should remand the proceedings to the Court of Appeals for consideration of respondents' petition for a writ of mandamus.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 73 C 517 (2)

CECIL LIVESAY, ET UX,

Plaintiffs,

vs.

PUNTA GORDA ISLES, INC., ET AL.,

Defendants.

Memorandum and Order

This matter is before the Court upon various motions concerning discovery and the notice that plaintiffs are required to send in this class action. After considering the arguments of both parties, the Court believes that notice should be sent to the initial register [sic] owners of stocks and debentures who purchased pursuant to the Registration Statement and Prospectus of May 2, 1972. The notice sent to those persons who may be nominees should include a request that the nominees inform the Court of the identity of any beneficial owners.

If through these efforts additional purchasers are identified the Court will order that notice be sent to them also. The Court does not see any need to notify all persons who registered within ninety days of the initial offering and defendants need only to produce the names of the initial registered owners. However, the plaintiffs will

not be required to conduct discovery, as least at this point, to identify all the beneficial owners.

Defendants have moved for a protective order in response to plaintiffs' request to produce certain documents. Defendants object to the fact that plaintiffs' prior counsel inspected many of the same documents and received copies of some nine hundred of those documents. Defendants will not be required to produce again any of those documents. However, plaintiffs may proceed with the remainder of the discovery at this time. The question of reimbursement to defendants for the cost of "double discovery" will be resolved later. Accordingly,

IT IS HEREBY ORDERED that defendants' motion for a protective order be and is DENIED in part and GRANTED to the extent stated above; and

IT IS FURTHER ORDERED that plaintiffs' motion to produce filed August 16, 1976 be and is DENIED in part and GRANTED in part; and

IT IS FURTHER ORDERED that defendants furnish plaintiffs with the names described above within fifteen (15) days of this date; and

IT IS FURTHER ORDERED that plaintiffs send those persons notice of this action as outlined by the Court on April 9, 1976 and as modified above by first class mail, postage pre-paid, within thirty (30) days of defendants production of names.

Dated this 7th day of September, 1977.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 73 C 517 (2)

CECIL LIVESAY, and DOROTHY LIVESAY, his wife,

Plaintiffs,

v.

PUNTA GORDA ISLES, INC., ET AL.,

Defendants.

Stay Order

Upon motion of the Court, insofar as the Supreme Court of the United States has granted certiorari in this action, *Coopers & Lybrand* v. *Livesay,* —— U.S. —— 46 U.S.L.W. 3316 (Nos. 76-1836, 76-1837, November 14, 1977),

IT IS HEREBY ORDERED that all pending motions and further proceedings in this action be and are stayed until further order.

/s/ H. KENNETH WANGELIN
United States District Judge

Dated this 7th day of December, 1977.

FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., *et al.*,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER COOPERS & LYBRAND

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IN THE

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for the Eighth Circuit

REPLY BRIEF FOR PETITIONER COOPERS & LYBRAND

ARGUMENT

I. **The Court of Appeals Was Without Jurisdiction of the Appeal From the Decertification Order.**

Coopers & Lybrand does not propose to reargue those points covered in its opening brief or to respond in intimate detail to

the many unsupported contentions advanced in respondents' brief. Rather, this reply brief will concentrate only on the more serious shortcomings in the arguments proffered to this Court by respondents.[1]

Throughout their brief, respondents seek to describe a "parade of horribles" which they predict would follow in the wake of this Court's rejection of the death knell doctrine. In almost every instance, the scene depicted is based upon unfounded conjecture, a distortion of the underlying facts and/or a misapplication of the controlling legal precepts. As a result, many of respondents' assertions which appear plausible at first blush cannot withstand close scrutiny.

A. Respondents Have Misconceived the Purpose of the Death Knell Doctrine and Are Asking This Court to Use Rule 23 Improperly to Enlarge the Jurisdiction of the Appellate Courts and to Expand the Substantive Rights of Class Action Plaintiffs.

Respondents' argument is punctuated with statements urging that adoption of the death knell doctrine is essential in order: to "open the courts to small claimants who could not afford to bring suit on an individual basis" (Resp. Br. 22); to avoid "[s]tripping a small claim-holder of the right to bring a class action" (Resp. Br. 23); and to protect and enhance "respondents' right to litigate their individual claim—which right as a practical matter depends on utilization of Rule 23 . . ." (Resp. Br. 30). This line of reasoning betrays two fundamental misconceptions which permeate respondents' analysis of the issues presented by this case:

1. The death knell doctrine was not conceived—and has never been applied—for the purpose of creating a special right of action

[1] Appropriate comments about respondents' Statement of the Case will be included in Point III of the Argument, *post*.

or a unique right of appeal in the class member who happens to win the race to the courthouse and thus the opportunity to represent the class. The *only* purpose for the doctrine was to ensure that the refusal to certify does not forever foreclose appellate review of the appropriateness of class action treatment. *Hooley v. Red Carpet Corporation*, 549 F.2d 643, 645 (9th Cir. 1977). In the seminal opinion in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966) (*Eisen I*), the court announced that the principal consideration supporting the creation of the death knell doctrine was that in the absence of an immediate appeal ". . . no appellate court will be given a chance to decide if this class action was proper under the newly amended Rule 23." Hence, respondents' repeated insistence that this Court must endorse the doctrine so as to permit them to pursue their individual claim is based on an erroneous view of the purpose of the death knell doctrine.

2. By advocating that the death knell concept should be adopted in order to guarantee that small claimants will not be stripped of their incentive to engage in litigation, respondents are asking this Court to stretch § 1291 far beyond its plain meaning for the purpose of creating *substantive* rights in respondents and their attorneys. In essence, respondents are urging this Court to violate the Rules Enabling Act, 28 U.S.C. § 2072, and Rule 82 of the Federal Rules of Civil Procedure.[2]

Respondents obviously believe that Rule 23 creates substantive rights in class action plaintiffs—rights which will encourage them to resort to the legal process and without which they might

[2] The Rules Enabling Act, which authorizes this Court to prescribe rules of procedure for the lower federal courts, also provides that "such rules shall not abridge, enlarge or modify any substantive right . . ."

Rule 82, Fed. R. Civ. P., states:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

very well forego litigation (Resp. Br. 22-23). Whether or not that is the effect of Rule 23 is really beyond the scope of this case.[3] It *is* abundantly clear, however, that Rule 23 cannot be utilized to expand the boundaries of appellate jurisdiction as delineated in 28 U.S.C. § 1291. Congress in 1934 authorized this Court to prescribe procedural rules, but:

> ". . . gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts." *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

Therefore, contrary to the thesis underlying respondents' entire presentation, Rule 23 cannot be used or construed "to extend or restrict the jurisdiction conferred by a statute." *Snyder v. Harris*, 394 U.S. 332, 337-38 (1969), quoting from *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941).

Respondents' Point 2(b) (Resp. Br. 26-29) is wholly predicated upon the assumption that § 1291 was designed to be subservient to Rule 23 and that the jurisdictional statute must be construed so as not only to preserve but to enlarge the rights of class action plaintiffs, thereby admittedly increasing the number of class actions filed. Respondents' efforts to elevate procedural rules to such prominence and to bend the words of Congress to create substantive rights through those rules should be rejected.

B. The Death Knell Doctrine Embodies an Improper Reading of § 1291 and Is Inconsistent With the Purposes of the Final Judgment Rule.

Several well-settled jurisdictional propositions have been completely ignored in respondents' advocacy. Among these are

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[3] Respondents are guilty of serious hyperbole when they assert that a "major purpose" of the drafters of Rule 23(b)(3) was the substantive one of increasing access to the courts (Resp. Br. 22). See *Advisory Committee's Notes to Proposed Rule 23 of Rules of Civil Procedure*, 39 F.R.D. 98 (1966).

the rules (i) that an order cannot be deemed final unless its "necessary result" is termination of the litigation and that "[a]ppeal rights cannot depend on the facts of a particular case," *Carroll v. United States*, 354 U.S. 394, 405 (1957); (ii) that the jurisdiction of federal courts is a matter for Congress, *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181-82 (1955); (iii) that "clear statutory mandate must exist to found jurisdiction," *Carroll v. United States, supra* at 399; and (iv) that Congress, by enacting 28 U.S.C. § 1292(b), has defined those orders which it deems appropriate for interlocutory review. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 746 (1976).

Even a casual reading of respondents' brief leads to the inescapable conclusion that adoption of the death knell doctrine would spawn confusion and uncertainty and would precipitate countless requests for *ad hoc* determinations of finality. Such a prospect would, of course, be completely antithetical to the certainty sought by Congress in enacting and adhering to the final judgment rule, which, after all, is the "dominant rule" of appellate practice. *DiBella v. United States*, 369 U.S. 121, 126 (1962). In addition, the very reason cited by respondents in their support of the death knell rule—the fact that it encourages litigation—is squarely at odds with one of the main purposes of the finality requirement, which is to "discourage undue litigiousness." *Id.* at 124.[4]

Nowhere in their brief do respondents explain how an order which does not even operate on a plaintiff's claim can or should be deemed "final" merely because his lawyer finds it economically

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[4] Respondents urge this Court to adopt a "practical" approach to finality in this case (Resp. Br. 20). But they fail to indicate how the death knell concept is "practical." Conversely, more than a decade of experience in the Second Circuit and elsewhere has demonstrated convincingly that the doctrine is impractical, if not impossible, for appellate courts to administer on a case-by-case basis.

inexpedient to proceed further.[5] Respondents do not propose any formulation of a death knell rule which would not also permit appeals of numerous other orders by any plaintiff who could convincingly argue that he would abandon the litigation if not allowed a prompt appeal. Nor do they suggest any effective way of obviating or neutralizing the avalanche of interlocutory appeals which would inevitably follow from this Court's adoption of the death knell doctrine.

1. **None of this Court's previous decisions call for acceptance of the death knell theory.**

Respondents rely heavily on the three-paragraph *per curiam* opinion of this Court in *Roberts v. United States District Court*, 339 U.S. 844 (1950), as authority for permitting death knell appeals. *Roberts*, however, presented a decidedly different question than is posed here. The Court in *Roberts* held that a denial by a district judge of a motion to proceed *in forma pauperis* was an appealable order. Obviously, such a ruling by the trial court *ipso facto* ended the case before it began because the pauper would be unable to pay the filing fee and, consequently, would never even get into the Clerk's office. The limitations of the *Roberts* rationale were demonstrated in *Miller v. Pleasure*, 425 F.2d 1205 (2d Cir. 1970), where the court refused to allow an appeal from an order refusing to appoint counsel for an indigent civil plaintiff. The Second Circuit held that *Roberts* was not in point and commented on the unique nature of an order denying leave to proceed *in forma pauperis:*

[5] Respondents erroneously argue that the trial court's decertification order is "final," despite the clear language of Rule 23 making such orders conditional, because "it is not predicated on facts that can change" (Resp. Br. 24). Assuming that problems of manageability, among others, can be overcome, a class action is still a possibility in this dispute if one or more of the major claimants, who might be adequate class representatives, would either intervene or file their own class suit. Thus, it cannot be said that the issues framed by this lawsuit will never be adjudicated on a class-wide basis.

> "Such an order closes the door to the courthouse to a plaintiff having a right to enter if he is indigent as he claims; an order declining to request an attorney to represent him simply denies an added facility in the prosecution of his claim which Congress has left to the discretion of the court." *Id.* at 1205.

A refusal to permit a plaintiff to represent a class is clearly not tantamount to a refusal to permit him even to file his lawsuit. In 15 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 3912, p. 512, the authors reject *Roberts* as a basis for the death knell doctrine, pointing out that: "The effect of denying class action status, however, is not automatically equivalent to the preclusive effect that may result from denial of pauper status."

Respondents also invoke *United States v. Nixon*, 418 U.S. 683 (1974), and *Brown Shoe Company v. United States*, 370 U.S. 294 (1962), in alleged justification of the death knell doctrine (Resp. Br. 20). Neither of these decisions supports expansion of the finality rule to encompass death knell appeals. *Nixon*, of course, arose in a "unique setting" involving discovery from the President of the United States. *Brown Shoe* confronted a difficult jurisdictional problem under the Expediting Act in a complicated antitrust case where the remedy of divestiture required a cautious application of the finality requirement.

The fact that this Court on occasion has permitted appeals in distinctive settings such as *Nixon* and *Brown Shoe* scarcely requires, or even supports, the endorsement of a sweeping new rule of appealability which would have a profound impact on thousands of cases each year.

2. **Respondents have misread and misapplied United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).**

As indicated previously, respondents, in their struggle to portray the death knell doctrine as consistent with the purposes

of the final judgment rule, have conjured up a series of hypothetical consequences which they foresee as flowing from rejection of the doctrine. Many of respondents' examples are infected with a distorted view of intervention and of this Court's holdings in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Most preposterous, perhaps, is respondents' suggestion that "rejection of the death knell doctrine would enhance rather than reduce the likelihood of piecemeal appeals" (Resp. Br. 25). The asserted basis for this statement is that another class member, intervening pursuant to *United Airlines, Inc. v. McDonald*, would present an inadequate record to the appellate court concerning *his* qualifications to lead the class. Elsewhere (Resp. Br. 28), respondents characterize the intervenor's purpose as the trial of his own individual claim to a conclusion before testing the validity of the earlier class action denial, thus supposedly fostering the "one-way intervention" referred to in *American Pipe*. Neither of these profiles of a *McDonald*-type intervenor is accurate.[6]

In *McDonald*, Stewardess McDonald intervened after settlement of the *Romasanta* action only for the purpose of contesting the prior ruling refusing class certification. She was not seeking to be named class champion or to litigate her individual claim but was requesting only a declaration that the originally proposed class, with Stewardess Romasanta as class representative, was an appropriate one for certification. The limited nature of her role is apparent from Mr. Justice Stewart's opinion for the Court, 432 U.S. at 390, where he characterized the Seventh Circuit as holding that the trial court had erred "in refusing to certify the class as described in the *Romasanta*

[6] Respondents' concern over what they call "one-way intervention" is unfounded and purely hypothetical because it is predicated on the extremely unlikely prospect of an intervenor's litigation of his own individual claim in their case after they have suffered a dismissal. In any event, the remote possibility of such an occurrence is hardly justification for the death knell doctrine because (a) statute of limitations problems discourage putative class members from abiding such

complaint." As to the narrow purpose of McDonald's motion to intervene, the Court said, *l.c.* 392:

> "That purpose was to obtain appellate review of the District Court's order denying class action status in the *Romasanta* lawsuit . . ."

Accordingly, the theoretical chaos concocted by respondents is simply non-existent. As a matter of practical fact, a class member desiring either to lead the class or to try his or her own individual claim would merely file a separate lawsuit. There would be no need or reason to intervene in a previously uncertified or dismissed action. The intervention contemplated by *McDonald*—that which renders the death knell doctrine superfluous—is solely for the purpose of appealing the refusal to certify the class action. Despite respondents' rhetoric, this use of the intervention mechanism does not create a multiplicity of lawsuits or appeals.

Respondents' criticism of *McDonald*, based upon their professed concern that other class members may be unaware of the pendency of the action, is refuted by the uncontroverted facts in this case. The record clearly reveals the existence of several large claimants who are fully aware of this litigation, who have expressed their willingness to help finance it, and who have instructed their lawyers to protect their rights (Apdx. 151-53).[7]

litigation, and (b) death knell appeals would have little or no effect in reducing the opportunities for such delay by putative class members since the same opportunity is present in every test case and in every denial of class certification in a case brought in the first instance by a plaintiff with a viable individual claim.

[7] Respondents indulge a false premise when they intimate that the judicial system has a duty to assume an affirmative, paternalistic role in order to protect potential litigants who have not asserted any claims and who are not vigilant or interested enough even to follow the litigation which is pending. Respondents' reliance on the so-called "right to remain passive" (Resp. Br. 28) finds no support in the law and is nothing more than another outgrowth of respondents' faulty premise that Rule 23 creates substantive rights. To the extent that respondents would require the courts to serve as watchdogs for otherwise disinterested class members, their suggestion misperceives the function of the legal process.

3. The death knell doctrine is decidedly unfair to defendants.

Respondents engage in further artificiality when they assert that the death knell doctrine does not discriminate against defendants (Resp. Br. 31-32). The advantage that respondents seek through the death knell doctrine is one of timing. It is an advantage which is critical—and often dispositive—in class actions. The death knell doctrine would permit an immediate appeal by a class action plaintiff from a denial of class certification without requiring the plaintiff to await final judgment on his individual claim. Defendants, on the other hand, faced with an order certifying a class, must endure massive discovery and a lengthy trial, with all its attendant risks, hardships, inconvenience and expense, before ever having a chance to challenge the order which subjected them to that ordeal. The discrimination is as real as it is prejudicial.[8]

It may be true, as respondents argue (Resp. Br. 32), that there are other motions which produce appealable orders if granted but not if denied (or *vice-versa*), but the examples cited by respondents are distinguishable in two important respects: (a) Finality is the immediate result of the appealable order itself and does not depend upon a strained reading of §1291 or an economic decision by a lawyer; and (b) although the grant of such a motion may produce an appealable order, whereas a denial would not, there is no systematic imbalance in favor of or against either plaintiffs or defendants because, for example, an order granting a final summary judgment is

[8] The Second Circuit has recently counseled that in formulating judge-made exceptions to jurisdictional statutes:

> "There is also the consideration of fairness as between the putative class and the party opposing the class [citation omitted]. Under any theory allowing appeal from denial of class status but not from class certification, the party opposing the class does not have equal access to review." *Williams v. Wallace Silversmiths, Inc.*, 566 F.2d 364, 367-68 n. 4 (2d Cir. 1977).

appealable by the losing party, regardless of whether he is the plaintiff or the defendant. The death knell doctrine, by contrast, always works in favor of the plaintiff and against the defendant.

In actual practice, it is probably true that the grant of class certification is more frequently the "death knell" of a case than a refusal to certify. At any rate, it is frivolous for respondents to contend that the death knell rule is "even-handed" in its treatment of plaintiffs and defendants. The only "even-handed" rule is one which either permits both plaintiffs and defendants to appeal the class determination immediately or requires both to obtain §1292(b) certification or await the final disposition of the case. *Cf. Morris v. Gressette*, 425 F.Supp. 331, 341 (D.S.C. 1976), *aff'd*, 432 U.S. 491 (1977).[9]

4. The death knell has not rung in this case under any formulation of the doctrine.

Even if the death knell theory is endorsed by this Court, the decertification order in this case was not appealable. Cecil Livesay's own characterization of his claim as viable (Apdx. 72-73), his counsel's previous representations of viability to the Eighth Circuit (Apdx. 106), and the vigorous pursuit of this case after the decertification order (Apdx. 16) combine to demonstrate that the death knell had not sounded.[10] Additionally, under the Ninth Circuit's version of the death knell the-

[9] Respondents' excuse (Resp. Br. 43-45) for disdaining §1292(b) simply begs the question. Since they had no "right" to appeal under §1291, the required use of the certification process under §1292(b) would, *a fortiori*, not impinge on any such "right."

[10] Contrary to respondents' contention (Resp. Br. 37, 43), the district court did not *find* that the basis for a death knell appeal had been established. Moreover, the statement of the trial judge referred to by respondents (Apdx. 166) was made in a different context almost two years prior to the decertification order.

ory, the decertification order was not appealable because of the presence of other class members willing and able to pay the costs, to litigate, or to intervene (Apdx. 151-52).

Respondents challenge the Ninth Circuit's adaptation of the death knell doctrine, which forbids an immediate appeal if *any* class member has a viable claim, because they say the Ninth Circuit rule is "not subject to easy application and would seriously complicate the litigation" (Resp. Br. 33). By urging rejection of the Ninth Circuit rule, respondents effectively concede—and properly so—that the decertification order in this case was not appealable under the holding in *Hooley v. Red Carpet Corporation, supra.*

To the extent that respondents suggest that the *Eisen I* death knell theory is less complicated or easier to apply than the Ninth Circuit rule, that thesis is completely without merit if all of the relevant factors are taken into account.[11] In fact, the very criticisms leveled by respondents at the Ninth Circuit doctrine are compelling arguments for disapproval of any form of death knell appeal. Furthermore, application of the Ninth Circuit rule presents no problem in the present case because several large claimants are clearly identified in the record.

Respondents' discussion brings to light yet another problem lurking in the *Eisen I* death knell rubric by stressing that the Court of Appeals was justified in making its *nisi prius* determination of nonviability on the basis of their "counsel's representation" that the case would be abandoned (Resp. Br. 35). Besides further highlighting the facts that the choice belongs to the attorney rather than the client and that the lawyer can always be expected to announce his disinclination to represent a single individual, this argument also illustrates that the death knell doctrine, in the form that respondents espouse it, creates

[11] See Coopers & Lybrand Main Brief 25; Punta Gorda Main Brief 13-19.

an ethical problem by making the plaintiff's counsel a likely witness on a substantive matter, in possible violation of Ethical Consideration 5-9 and Disciplinary Rule 5-101(B) of the Code of Professional Responsibility.

* * * * * * * *

The final judgment rule has endured well and has effectuated the sound policy of preventing piecemeal appeals and the over-burdening of our judicial system. The death knell doctrine clearly represents a "compromise of the principles of appellate review." *Share v. Air Properties G., Inc.*, 538 F.2d 279, 283 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976). Noting the "obvious difficulty in administering" the rule and the "great temptation to attribute finality to orders granting or denying class action status," the authors of WRIGHT & MILLER, *supra*, §3912, pp. 513, 522, offer the following observations:

> "The death knell doctrine responds to this temptation, but in highly unsatisfactory fashion. It requires drawing unsatisfactory *ad hoc* lines to distinguish the cases that are presumed to be fatally afflicted by erroneous class action rulings. Worse, it does not provide any means at all for responding intelligently to the desirability of granting or denying appellate review in cases falling outside the death knell lines. If appeals are to be allowed as a matter of right under a finality theory, the theory should be developed in other terms."

The death knell doctrine can never apply in instances where a successful plaintiff is allowed to recover attorneys' fees, such as civil rights cases.[12] Thus, its reach has been restricted mostly to securities cases and to some antitrust litigation. *Hackett v. General Host Corporation*, 455 F.2d 618 (3d Cir.), *cert. de-*

[12] See 42 U.S.C. §2000e-5(k); 42 U.S.C. §1988; *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841 (8th Cir. 1977), *cert. denied*, — U.S. —, 46 U.S.L.W. 3293 (1977); *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975).

nied, 407 U.S. 925 (1972). But even though its scope is somewhat confined, the doctrine is a distortion of the final judgment rule, is incompatible with the philosophy forbidding piecemeal appeals, has created confusion and encouraged abuse, and is simply unworkable and undesirable. Its final requiem should be conducted by this Court.

C. The Decertification Order Was Not Appealable Under Either Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949), or Gillespie v. United States Steel Corporation, 379 U.S. 148 (1964).

Respondents, recognizing the slender reed on which they lean in attempting to defend the death knell doctrine, also assert that the jurisdiction of the Court of Appeals was proper under *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), and *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964) (Resp. Br. 38-43).

Respondents cite not one single case in which appellate jurisdiction of an order refusing class certification has been sustained on the basis of the collateral order doctrine announced in *Cohen*. Nor has our research turned up any such case. Quite to the contrary, the authorities cited by way of example only in footnote 8 of our opening brief reveal that the collateral order doctrine has been consistently and unanimously rejected as a basis of review of refusals to certify class actions. Such a refusal does not "finally" determine any "claims of right" because (i) it is avowedly subject to alteration under Rule 23 (c)(1), and (ii) no "claims of right" of the plaintiff are affected since maintenance of a class action as such is purely a procedural matter. No "claims of right" of other putative class members are lost because they retain the opportunity to seek class relief through *McDonald*-type intervention or in a separate suit. In *Williams v. Mumford*, *supra* at 369, the court

articulated some of the reasons why the collateral order doctrine has never been applied to class certification denials:

> "In this case, the refusal to certify a class action did not determine collateral claims completely independent of the merits of the case. The order is indistinguishable from other procedural determinations made in the course of discovery and trial. No funds were required to be expended as in *Eisen*, nor rights granted under independent statutes to be dispensed with as in *Cohen*. Above all, the correctness of the District Court's decision is subject to effective review on appeal from final judgment."

The class action determination, by definition, is not a separable and collateral matter but, in most instances, requires an analysis of the nature of the named plaintiff's claim and a review of the issues presented by the case to determine whether common or individual questions predominate. As WRIGHT & MILLER, *supra*, § 3912, p. 511 says:

> "The class action situation, however, presents problems that distinguish it from collateral order reasoning.
>
> . . .
>
> "Turning first to the more fundamental distinction, great difficulty is encountered in separating denial of class action status from the merits of the underlying litigation."

Furthermore, the typical refusal to certify does not present any "serious and unsettled question" within the meaning of *Cohen*, and the issue can be fully reviewed on appeal from a final judgment. *In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213 (8th Cir. 1977).

Nor can respondents derive any comfort from *Gillespie v. United States Steel Corporation, supra*. That case involved an extremely unusual fact situation and has been rarely used as

a basis for interpreting §1291. Its doctrine has been described as residing in a "dismal limbo," WRIGHT & MILLER, *supra*, §3913, p. 535, and has never been applied in the class action context. Although *Gillespie* did appear to depart rather radically from previous decisions applying the final judgment rule:

> "Perhaps the best explanation of the opinion is that the Court was attempting to formulate a rule that would allow disposition on the merits of appeals that had mistakenly been taken from non-final decisions." WRIGHT & MILLER, *supra*, §3913, p. 534.

Gillespie, which ruled narrowly in a fairly esoteric jurisdictional context, cannot be used as a wedge to open a broad new breach in the final judgment wall through which would surge a tide of interlocutory appeals in an enormously large class of cumbersome cases.

D. Respondents' Defense of Class Actions Is Irrelevant to the Issues Presented by This Case.

Respondents have devoted a sizable portion of their brief to an apologia for the class action (Resp. Br. 45-54). This entire discussion is irrelevant to the questions presented by this case since neither the validity nor the interpretation of Rule 23 is involved here, except insofar as respondents have attempted to use that procedural rule to create and enlarge their substantive rights.

We are constrained nonetheless to respond directly to some of the unfounded statements about our stance and about class actions contained in respondents' presentation. At the outset, it should be noted that proper articulation of the issues belies respondents' accusation that petitioners have demonstrated a "callous" contempt for the needs of persons with limited means or small claims (Resp. Br. 47-48). Allocation of the limited

federal appellate resources is a difficult task which inevitably forecloses some would-be appellants. Our position is simply that the forthright application of the finality requirement of § 1291, mitigated through proper application of those exceptions to finality created by Congress or already recognized by the Court, is the best way to allocate those limited resources. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969). We have also questioned whether a rule which encourages and rewards litigation by the *smallest* of several possible claimants is appropriate.

We must register skepticism about respondents' implicit suggestion that class actions invariably make substantial contributions to a better society. For every example of a significant monetary or injunctive recovery benefiting class members, there are corresponding examples of class actions clogging the courts with unmanageable classes or *de minimis* individual injuries.[13] Indeed, respondents' own "authority," a document published by the Senate Committee on Commerce, *Class Action Study*, 93d Cong., 2d Sess. (Comm. print. 1974) (hereinafter "*Study*"), shows that class monetary relief was obtained in only 14 of the 120 damage class actions studied and that only six or seven cases proceeded to final judgment after trial (*Study* at pp. 10, 19).

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[13] See, *e.g.*, *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974) (class action denied when individual claims for hotel telephone overcharges averaged $2.00); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743 (N.D. Ohio 1975) (class certification denied when trebled individual recovery was approximately $9.75); *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D. N.Y. 1973) (class action denied when individual claims were $1.00); *American Servicemen's Union v. Mitchell*, 54 F.R.D. 14 (D.D.C. 1972) (proposed class consisted of all American citizens who have advocated or intend to advocate unpopular ideas); *United Egg Producers v. Bauer International Corp.*, 312 F.Supp. 319 (S.D.N.Y. 1970) (proposed class consisted of all consumers of eggs in the United States).

Respondents' statistical analysis of class actions is both misleading and of extremely limited probative value because it is based on a very small and selective sample. The statistical part of the *Study*, on which respondents place heavy emphasis (Resp. Br. 49-52), summarizes the results of an analysis of only 120 class actions in which damages were sought. All of these actions were filed in a *single federal district*—the District of Columbia—which is hardly a typical forum. To the extent that respondents rely on data about the filing of class actions to minimize their impact on the court system, they ignore the fact that class actions take longer to process. Thus, the percentage of pending civil cases represented by class actions is consistently at least 150% greater than the percentage of new class action filings. See 1977 *Annual Report of the Director, Administrative Office of the United States Courts*, p. 121.[14] The evidence that respondents contend "strongly refutes" the contention that class actions tend to extort settlements in unmeritorious cases (Resp. Br. 50), is based only on *interviews with two lawyers*, which, we submit, are far less persuasive than the observations of federal judges who have seen, touched and endured such cases on a regular basis. *Compare Study* at pp. 9-10, *with* Coopers Br. 31-32, n. 23.

For what they are worth, the *Study's* statistics actually confirm many of the observations contained in our opening brief. They show that the number of class actions filed in the District of Columbia increased by 700% from 1967 to 1972 (*Study* at p. 5). The fact that only six or seven of the 120 cases were litigated to conclusion confirms that class actions are "rarely" tried. Although class recoveries were not literally "consumed" by costs and attorneys' fees, the *Study* also supports our expressed conviction that the death knell fight is a "lawyers' fight."

[14] The statement to the contrary in the *Study* quoted by respondents must be discounted because, among other things, the *Study* was admittedly based on "a disproportionate number of cases of shorter duration." *Study* at p. 11.

While the numbers are so small as to be virtually meaningless, more than 10 percent of the cases studied resulted in awards of fees to the plaintiffs' attorneys in excess of 50% of the total recovery (*Study* at pp. 21, 29). In view of the fact that the death knell doctrine operates almost exclusively in the antitrust and securities law areas, the following comment from the *Study* is particularly enlightening:

> "Antitrust and securities actions accounted for the largest fees comprising all the suits involving fees of over $500,000 and 85 percent of the cases with fees between $100,000 and $500,000." *Id.* at p. 29.[15]

To reiterate, however, the relevance of any statistics or observations about such matters lies merely in gaining an appreciation of the context in which the death knell doctrine would expand the number of appeals by plaintiffs as a matter of right. These problems and this unusually great potential for abuse are important, not because the Court should abolish or restrict class actions, but because they counsel against granting class action plaintiffs a special, preferred status that would expand these problems into the appellate courts.

II. Since Respondents Did Not File a Cross-Petition for Certiorari, the Court of Appeals' Dismissal of Their Mandamus Petition Is Not Before This Court.

Respondents urge that if the Court of Appeals is determined to have been without appellate jurisdiction, this Court should remand the case to the Eighth Circuit for reconsideration of

[15] The *Study* took note of the prevailing concerns that "the primary purpose in bringing the suit as a class action, even though an individual suit might have been in the client's best interest, was to obtain large attorney's fees" and that "plaintiffs' attorneys may gain more than any individual class member." (*Study* at p. 22).

respondents' mandamus petition, which was dismissed as moot (Resp. Br. 54-55). However, respondents' request for an alternative remedy is not properly before this Court because they did not cross-petition for certiorari. *Strunk v. United States*, 412 U.S. 434 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970): *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 462 (1941); *Helvering v. Pfeiffer*, 302 U.S. 247 (1937); *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484 (1934); *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52 (1927).

Respondents' reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970), and *Langnes v. Green*, 282 U.S. 531 (1931), is misplaced. Those cases, following *United States v. American Railway Express Company*, 265 U.S. 425, 435-36 (1924), held that a cross-petition is not necessary where the respondent "does not attack, in any respect, the decree entered below," but instead "merely asserts additional grounds why the decree should be affirmed." But where alteration of the Court of Appeals' ruling in the manner requested by the respondent would not result in an affirmance of its judgment, a cross-petition is required. *Mills v. Electric Auto-Lite Co., supra* at 381, n. 4. In the case at hand, respondents are not seeking an affirmance of the Court of Appeals' judgment on alternative grounds. Instead, they are asking this Court to vacate the Eighth Circuit's dismissal of their mandamus petition, thereby reviving a claim and a separate theory of relief which they have abandoned. This they cannot do in the absence of a cross-petition.

The obvious distinction between an appeal and a mandamus proceeding was acknowledged by respondents in the Court of Appeals when they filed their petition for mandamus in a proceeding which was separate and apart from the purported appeal, and by the Eighth Circuit when it was assigned a separate docket number in that court. Whereas in the appeal respondents asked for a reversal of the district court's order, the

mandamus petition requested a peremptory writ commanding the district judge to recertify the class. Mandamus is an extraordinary and drastic remedy containing its own standard of review, and it is not a substitute for an appeal. *Will v. United States*, 389 U.S. 90 (1967).

In *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 175 (1937), the Court held that in the absence of a cross-appeal by the plaintiff, it was error for the Court of Appeals to affirm the judgment for that plaintiff on the theory of specific performance when the trial court had based its judgment on a breach of a duty of exoneration. The Court emphasized that the judgment as revised by the Court of Appeals involved a "modification of the decree itself," and that the relief granted was modeled upon different legal principles. *Id.* at 191. Hence, when a respondent urges a different form of judgment or seeks a different type of relief, he must cross-petition. Respondents here have failed to preserve their mandamus theory, and there is no basis for remanding this case to the Court of Appeals.[16]

III. The Court of Appeals' Reversal of the Decertification Order Was Erroneous.

In attempting to justify the ruling of the Eighth Circuit, respondents disregard the Court of Appeals' clear departure from the applicable scope of review and persist in their attack upon the district judge and petitioners by blaming them for the delay which respondents themselves occasioned. Since the issue is whether the district court's view of respondents as class representatives was so warped as to warrant interlocutory intervention by the appellate court, it is respondents' conduct, not that of

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[16] If respondents were actually seeking to support the result reached by the Eighth Circuit, the appropriate course for this Court would be to decide the validity of the decertification order, inasmuch as that question was presented in Coopers & Lybrand's Petition for certiorari.

the judge or of petitioners, which is on trial and which must be shown to be so clearly above reproach that the trial judge had no conceivable basis for his decertification order. Respondents have not made and cannot make such a showing.

Though accusing the district court of procrastination in ruling on the class certification motion (Resp. Br. 57), respondents fail to explain why they waited nine months before seeking class certification while conducting discovery, not on the class action issues, but on the merits of the case (Resp. Br. 3, Apdx. 2, 4). Once respondents' motion for class certification was finally filed, the district court's prompt actions are completely at variance with respondents' allegations of delay. On June 7, 1974, the initial phase of briefing in connection with respondents' motion was completed (Apdx. 7). On June 18, the court set the motion down for oral argument, which was held on June 24 (Apdx. 87-91). Less than a month later, on July 19, 1974, the district court issued its order ruling that individual proof of reliance would not be required of each member of the class (Apdx. 91-93).

Consistent with its intentions announced at the oral argument on the class motion, the court did not in its order of July 19, 1974, either grant or deny respondents' motion for class certification (Apdx. 89, 91-93; Tr. of 6/24/74, p. 37). Instead, it awaited the presentation of further evidence from respondents pertaining to the suitability of the case for class action treatment. This information was not forthcoming for more than five months, during which period respondents, by various stratagems, sought to bypass the difficult class action issues and force the district court into opening up discovery on the merits (Apdx. 96-97, 103-07). Respondents now seek to excuse this delay on the grounds that the district court "did not order a hearing" (Resp. Br. 4). Nevertheless, it was clear to all involved that the district court believed that an evidentiary hearing was necessary and that, in any event, the burden of perfecting the suit for class

treatment was on respondents. Indeed, respondents subsequently acknowledged their obligation when, on November 18, 1974, they finally requested the class action hearing (Apdx. 108-09).

Once respondents asked for the hearing, the district court again acted with dispatch. On November 27, 1974, the court suggested to counsel that the hearing be held in December, and it was set for and held on December 30 (Letter dated Nov. 27, 1975, from Hon. H. K. Wangelin to counsel of record; Apdx. 9, 109-66). Preparation of the transcript of the hearing and filing of post-hearing briefs by all parties was not completed until May 24, 1975 (Apdx. 11). The motion for class certification was submitted to the district court shortly thereafter and, once again, was disposed of in less than a month. On June 19, 1974, the court ruled favorably on the certification question and ordered respondents' prior counsel to show cause why he should not be enjoined from representing the class (Apdx. 168-74).[17]

Respondents characterize the district court's post-certification action as acquiescing "in repeated requests by petitioners for reconsideration of prior decisions" (Resp. Br. 7). Petitioners certainly had the right—indeed the obligation—to contest rulings which they considered to be erroneous. In fact, on several occasions, they were successful in persuading the district judge to change his mind and to overrule previous incorrect rulings. None of petitioners' attempts to protect their rights have been branded as unfounded by either the district court or the Court of Appeals. More importantly, however, there is no evidence that the matters raised by petitioners contributed in any way to delay in this case.

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[17] The district court in its subsequent decertification order indicated, albeit somewhat inartfully, that the six-month delay between the evidentiary hearing and class certification was at least partially due to the conflict of interest which ultimately led to the substitution of new counsel (Cert. Pet., p. A-2).

In referring to "the fourteen extensions of time (totalling approximately 190 days) obtained by petitioners during the litigation" (Resp. Br. 57), respondents fail to note that many of those extensions granted to the eleven petitioners ran concurrently, thereby having a net effect of considerably less than 190 days (Apdx. 2-6). Respondents likewise ignore the fact that they too have been granted seven extensions of time totalling 108 days during the pendency of the litigation (Apdx. 4, 7, 10, 11, 13, 15; letter dated May 23, 1974, from M. Green to Hon. H. K. Wangelin). These unopposed extensions to counsel played no part in the trial judge's evaluation of respondents' adequacy as class representatives. Rather, the delay referred to by the court in its decertification order was respondents' refusal to follow the program set up by the district court for handling the class action issues.

The principal cause of the many months of stagnation after class certification was respondents' failure to apprise the district court of the true status of the underwriters as potential defendants. Respondents do not deny that on the very day that their present counsel appeared in the case, the district court inquired whether any underwriters would be named as defendants. This was a logical inquiry concerning a fundamental matter that would affect the progress of the litigation. Yet, the district court did not receive a definitive answer from respondents for more than four months. Not until the district court issued an order directing respondents either to name the underwriters or to offer reasons for not doing so did respondents acknowledge that the statute of limitations had expired as to such claims during the period in which respondents were shielding their counsel's conflict of interest (Apdx. 186-87; Resp. Br. 9, 60). This extended delay in clarifying the status of the underwriters hindered the drafting and mailing of the notice to the class as well as substantive discovery.[18]

[18] Respondents criticize the district court for taking more than four months to approve the form of notice to the class (Resp. Br. 9, 57). As respondents know, that delay was not due to any lack of diligence by the district judge but rather was the result of a clerical error in the district clerk's office. The district court took the proposed notices under submission on December 5, 1975. Within one month it had approved the form to be sent to the class and had written letters enclosing copies to all counsel (Apdx. 14). Somewhere between the judge's office and the mailbox, probably in the clerk's office, those letters were misplaced. As soon as the court realized that counsel had not received the notice, a second letter was sent (Apdx. 14, 193). It is unfair for respondents to portray this mix-up as a manifestation of indifference by the district court.

Finally, respondents try to obscure the effects of their conduct by repeatedly complaining about the partial stay of discovery imposed by the district court (Resp. Br. 4-6, 7-8, 13, 57, 62). They fail to appreciate the economy achieved by such a stay, first in focusing attention on the class issues and thereafter in avoiding duplication of discovery if additional parties are joined in the lawsuit. Thus, the stay was appropriate until the question of the underwriters' joinder was finally resolved. Moreover, once the stay was lifted to permit discovery of the names and addresses of the class members, respondents did nothing. Although the district court on October 23, 1975, directed respondents to proceed with discovery "as to finding the names and addresses of the class members" (Apdx. 189), respondents disregarded those instructions in favor of their own past practice. They deliberately chose not to make any effort whatsoever to obtain that information for six months and failed to commence formal discovery for more than nine months (Apdx. 200).[19] The trial court's subsequent decertification order was premised upon its discretionary evaluation of this and other refusals by respondents to cooperate with the court and to follow its instructions; it was not based in any way on the lack of progress on substantive discovery (Cert. Pet., p. A-2).

[19] The correspondence received from Punta Gorda's counsel did not contain any representations relieving respondents of the duties imposed by the district court's October 23rd order (Apdx. 176-77, 215).

The pattern which emerges from the record is not one of delay and foot-dragging by the district court or petitioners but rather a refusal by respondents to follow the directives of the district court. Respondents chose to ignore rather than cooperate with the district court's efforts to resolve the class action issues. They considered their methods superior to those adopted by the trial court and therefore sought to impose upon the court their own allegedly "standard practices" (Resp. Br. 10). Given this backdrop of events, as well as its own earlier stated misgivings about respondents' adequacy as class representatives (Apdx. 187-88), the district court certainly acted well within its discretion in decertifying the case as a class action.

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March 11, 1978

FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,
v.
CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
Petitioners,
v.
CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I

The Brief for Petitioners Punta Gorda Isles, Inc., et al. (hereinafter referred to as "Petitioners' Brief") advanced the following argument: (a) 28 U.S.C. § 1291 permits an appeal only from

"final decisions"; (b) the question of finality under the death knell doctrine is treated as a question of fact; (c) the correct and just resolution of questions of fact depends on the existence of adequate procedural safeguards that will ensure a full opportunity to develop and present evidence; (d) the minimum procedural safeguards necessary for an accurate and fair resolution of fact questions, safeguards perhaps mandated by due process, include notice, a hearing with an opportunity to present evidence, and perhaps an opportunity to discover evidence prior to the hearing; (e) such procedural safeguards were not provided in this case, in which there was neither a hearing nor any opportunity to present or to discover evidence regarding finality; and, therefore, (f) the denial of these procedural safeguards is by itself sufficient reason to reverse the decision of the Court of Appeals in this case. (Petitioners' Brief, pp. 7-12)

The Respondents do not address the need for procedural safeguards that must be provided if this Court accepts the death knell doctrine. Rather, the Respondents seek to avoid this critical question of fair procedure by the simplistic argument that the evidence in the record in this case supports the finding made by the Court of Appeals. In so doing the Respondents blithely ignore the following facts: (a) the finding was based on bits and pieces of evidence that were offered at various times for other wholly unrelated purposes; (b) the district court never addressed the issue of finality or heard evidence specifically presented on that issue; (c) the presence in the record of some evidence that might support the Court of Appeals' finding does not insure or even imply that the finding was accurate or that it was fairly reached.

Moreover, the Respondents completely disregard the important question of what additional evidence the record might have contained if an opportunity had been afforded the parties to develop and present evidence on finality.

Even if the resolution of the finality question were restricted to the meager evidence on that issue contained in the record, the Respondents pass over the most relevant evidence: The Respondents' former counsel, in sworn testimony, stated that other members of the class were willing to finance the continued prosecution of the case (A151-153). The Court of Appeals should not have decided the issue of finality without permitting Petitioners to discover and to offer additional evidence on the role of those other class members in financing this litigation, and it erred when it did so.

II

The Court of Appeals also erred in focusing its inquiry into finality on the size of the Respondents' individual claims. In this case, and in most class actions, the size of the individual claims of the would-be representative plaintiffs has little or no bearing on the finality of an order denying class action status. In all cases it will be financially possible for the plaintiffs to prosecute their individual claims and then appeal the class action ruling. The possession of such financial resources by the plaintiffs must be assumed, because otherwise they could not adequately represent the class. The real issue, therefore, is not whether it is impossible for the plaintiffs to prosecute their individual claims before they appeal from the class action decision. It is, rather, whether that course is financially so unattractive to the plaintiffs that they will abandon their case after the adverse ruling on the class action issues.

Respondents dismiss as "sheer speculation" the Petitioners' analysis of how a plaintiff would decide whether to continue to prosecute after an adverse decision on the class action question. But Respondents in the same breath in effect concede the Petitioners' premise that the "finality" of an order denying class action status depends upon an analysis of the risk-reward ratio

by [redacted] the plaintiffs and their counsel; they state that the Petitioners' analysis

> deserves little weight as against the concrete reality of the substantial resources which would have to be expended in prosecuting the individual claim to a conclusion before an appeal on the class question could be taken, and the risk of a total loss of such resources and denial of attorneys' fees if class status is not ultimately restored. (Respondents' Brief, footnote, p. 37)

For a plaintiff to be forced to delay his appeal from the class action decision until after a final decision on the merits involves some obvious risk to the plaintiff. There are, however, risks in all litigation. Even if the plaintiffs had prevailed in the district court on the class action issues, they would face substantial risks on the liability issues. The risk to the plaintiffs involved in a delayed appeal on the class action issues is certainly not of a different order of magnitude than the risk associated with the liability issues or the other risks commonly faced in litigation. Yet both plaintiffs and defendants in other kinds of cases face those comparable risks without need of a non-statutory and interlocutory appeal.

In short, a district court ruling on the class action issue adverse to the plaintiffs does increase the risk to the plaintiffs. The critical question is whether that increase so alters the plaintiffs' analysis of the risks and potential rewards that they will abandon their claims. For the reasons stated in the Petitioners' Brief (pp. 13-19), that question cannot be answered by looking only to the size of the plaintiffs' individual claims, their financial resources, and the probable cost and complexity of the lawsuit. Even if this Court does not reject the death knell doctrine, it should rule that the Court of Appeals erred in this case by too narrowly restricting the scope of that inquiry.

This Court should, however, reject the death knell doctrine and rule that a mere increase in the risk faced by the plaintiffs,

regardless of the magnitude of that increase, does not convert an interlocutory order into a "final decision." For purposes of § 1291, finality should not be measured by the effect of the decision on the plaintiffs' volition.

III

Rejection of the death knell doctrine would postpone an appeal from a class action decision until after the decision on the merits, *i.e.*, until after an unquestionably "final" decision, or would require the plaintiffs to seek certification under 28 U.S.C. 1292(b) for an interlocutory appeal. Postponing that appeal would require the plaintiffs to assume an economic risk that they could avoid if an immediate appeal was permitted. However, the purpose of the class action device is not to remove all economic risk from would-be representative plaintiffs. It is merely to provide a forum in which their claims for themselves and on behalf of the class can be determined. For the plaintiff who is willing to undertake the risk, that forum is available without death knell appeals.

The additional economic risk imposed on the plaintiff by postponing his appeal from an adverse class action ruling until a final judgment on the merits does not overweigh the principles behind the statutory mandate of § 1291; that additional risk does not warrant making class actions even more complex by creating the procedures necessary to implement the death knell doctrine fairly. The death knell doctrine should be rejected.

CONCLUSION

The Respondents' Brief meets none of the arguments made in the Petitioners' Brief. The Respondents do not discuss the procedure by which "finality" can be determined if the Court accepts the death knell doctrine. Nor do they demonstrate any fallacies

in the Petitioners' analysis of the factors to be considered in determining finality. Indeed, they acknowledge that that determination must be based upon the plaintiffs' individualized risk-reward analysis. The Respondents do not attempt to balance the cost of accepting the death knell doctrine (as measured by the additional procedural complexities involved in a fair determination of finality) against the minimal gains to be achieved by that acceptance (relief of would-be representative plaintiffs from some economic risk). The Court should decide that the gain is not worth the cost and reject the death knell doctrine. Even if the Court does not reject the doctrine, however, the judgment of the Court of Appeals must be reversed, because of the failure to require a hearing on the issue of finality and because of the unduly narrow inquiry that was made into the question of finality.

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